Date: 20071023

Docket: IMM-5467-06

Citation: 2007 FC 1096

Ottawa, Ontario, October 23, 2007

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

INDRABALAN RATNASINGAM

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (the Board) dated September 20, 2006 allowing the Minister's appeal and remitting the matter before the Board's Immigration Division (ID) for a determination as to whether the applicant is inadmissible pursuant to section 35 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). The case deals with whether a refugee hearing makes *res judicata* the issue of the applicant's inadmissibility for crimes against humanity.

FACTS

[2] The applicant is a Sri Lankan citizen of Tamil descent who arrived in Canada on October 12, 1996 claiming refugee protection. At the time the applicant made his claim he revealed that he served as a police officer in Sri Lanka. This fact is reflected in the immigration officer's Port of Entry notes dated October 12, 1996.

[3] The applicant's refugee claim was subsequently referred to the Convention Refugee Determination Division (CRDD), where it was heard on April 14, 1997. On July 2, 1997, the applicant was determined to be a Convention refugee.

[4] On August 23, 1997, the applicant received notice from Citizenship and Immigration Canada (CIC) that he met the eligibility requirements for permanent resident status and that a final determination would be made in 18 months.

[5] On April 30, 2003, almost six years after first receiving notice from CIC regarding his application for permanent residence, the applicant was asked to attend an admissibility interview to address his background as a Sri Lankan police officer. At the interview, the examining officer stated that the significant delay between the CIC notice and the admissibility interview was due to the fact that CIC was given "other priorities" and that interviewing the applicant was of a "low priority." Based on the interview, the examining officer issued a report stating that there were reasonable grounds to believe that the applicant committed or was complicit in crimes against humanity as defined in the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, and that he is

therefore inadmissible to Canada pursuant to paragraph 35(1)(a) of the IRPA. The examining officer's report was forwarded to the ID for an admissibility hearing.

[6] On April 19, 2004, the ID terminated the admissibility hearing on the basis that the Minister was precluded from pursuing an allegation of inadmissibility by operation of *res judicata*, since the issue could have been raised before the CRDD at the applicant's refugee hearing. The ID concluded that all of the preconditions for *res judicata* had been satisfied, and that there existed no exceptional circumstances that would warrant refusing to apply the doctrine in this case. However, in *obiter*, the ID held at paragraph 43:

> **¶ 43** There is no evidence before me to link the person concerned with specific crimes against humanity or war crimes. The only other way for the Minister to make out the allegation would be to establish that Mr. Ratnasingam was an accomplice in such (specific) crimes.... There is no evidence before me whatsoever concerning the nature of, or the acts committed by, the police units in which Mr. Ratnasingam served.

The Minister appealed the decision to the IAD.

Decision under review

[7] On September 20, 2006, the IAD allowed the Minister's appeal and remitted the matter to the ID for reconsideration in accordance with the IAD's reasons. The IAD's reasons for allowing the appeal were two-fold:

> **¶ 15** The panel is of the view that the appeal should be allowed because the preconditions to the operation of *issue estoppel*, a species of *res judicata*, have not been established and in any event, even if the preconditions have been met, there are valid reasons for this panel to exercise its discretion not to apply *issue estoppel* in this case.

> Those reasons also support a finding that an admissibility hearing to test the allegation against the respondent would not be an abuse of process.

[8] With respect to its application of issue estoppel, the IAD concluded that the ID "erred in finding an identity of interest between the Minister and the CRDD or the Refugee Hearing Officer." The IAD held that the CRDD (now the Refugee Protection Division or RPD) is an independent division of the Board and, as such, if there was an identification of interest between the CRDD and the Minister such that the CRDD was a "privy" for the Minister in the refugee hearing, then the CRDD "would lack institutional independence and its decisions would be reviewable for that reason."

[9] The IAD went on to state that regardless of whether the preconditions of issue estoppel had been met, there nevertheless existed valid reasons for the ID to exercise its discretion to refuse to apply *issue estoppel* in this case. In framing its argument around the conclusion that convoking the applicant to an admissibility hearing would not amount to an abuse of process, the IAD stated:

> **¶ 25** In the panel's opinion, it would be contrary [to] the purpose of *IRPA* and Parliament's approach to war crimes and crimes against humanity to interpret provisions of *IRPA* to conclude that, once a person has been found to be [a] Convention refugee without the issue of war crimes or crimes against humanity being raised and squarely dealt with, the issue cannot be raised in subsequent litigation. A review of the transcript of the refugee hearing establishes that the issue of exclusion was not raised by the Member hearing the claim or the Refugee Hearing Officer assisting her….

RELEVANT LEGISLATION

[10] The legislative context underlying this matter is important. The applicant was found to be a Convention refugee under the provisions of the former *Immigration Act*, R.S.C. 1985, c. I-2 (the former Act). Further, the applicant's application for permanent residence was submitted under the former Act. On June 28, 2002, the IRPA came into force. By virtue of section 190 of the IRPA, the applicant's permanent residence application was to be determined in accordance with the provisions of the IRPA after June 28, 2002. Accordingly, the legislation relevant to this application is the IRPA. The relevant provisions contained therein have been attached to the end of this judgment as Appendix "A."

ISSUE

[11] There are two issues for the Court to consider in this application:

1. Whether the IAD erred in finding that the preconditions of issue estoppel were not met; and
2. Whether the IAD erred in concluding that even if the preconditions of *issue estoppel* were met, there existed sufficient reasons for the IAD to exercise its discretion in refusing to apply the doctrine.

STANDARD OF REVIEW

[12] In *Rahman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1321, [2006] F.C.J. No. 1661 (QL), Mr. Justice Noël considered the standard of review to be applied to the IAD's *res judicata* analysis. Relying on the Supreme Court of Canada's decision in *Danyluk v. Ainsworth*

Technologies Inc., 2001 SCC 44, [2001] 2 S.C.R. 460, Mr. Justice Noël found that the application of issue estoppel, the branch of *res judicata* at issue in both *Rahman* and the case at bar, involves a two-step process, with each step attracting a separate standard of review. I adopt the following passages of Mr. Justice Noël's decision, as they also apply to the matter currently before the Court:

> **¶ 10** In *Danyluk*, above, the Supreme Court emphasized that applying issue estoppel … involves a two-step process. Justice Binnie, writing for a unanimous court, summarized the proper approach in paragraph 33:
>
> > The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle, supra*. If successful, the court must determine whether, as a matter of discretion, issue estoppel ought to be applied….
>
> **¶ 12** Whether the preconditions to the operation of issue estoppel were met is a question of law. The issue affects the individual Applicant's procedural rights and the IAD has no greater expertise in applying the doctrine relative to the Court's expertise in this area of the law. These factors point toward a strict standard of review. Therefore, the appropriate standard of review of the IAD's *res judicata* analysis at the first stage is correctness….
>
> **¶ 13** Conversely, the second-step involves an exercise of discretion and a weighing of relevant factors to determine whether special circumstances warrant the non-application of issue estoppel in this case. Discretionary factors attract a more deferential review…. Therefore, patent unreasonableness is the appropriate standard of review for the second-step.…

[13] Accordingly, in the case at bar, the issue of whether the IAD erred in concluding that the preconditions of issue estoppel were not met will be reviewed on a standard of correctness. However, the question of whether the IAD erred in exercising its discretion to find that there was no

abuse of process is entitled to greater deference and will be reviewed on a standard of patent unreasonableness.

ANALYSIS

Issue No. 1: <u>Did the IAD err in concluding that the preconditions of issue estoppel were not met?</u>

<u>*Res Judicata* and Issue Estoppel</u>

[14] The doctrine of *res judicata* is comprised of two branches, cause of action estoppel and issue estoppel, and is "founded on public policy so that there may be an end of litigation, and also to prevent the hardship to the individual of being twice vexed for the same cause": *Fenerty v. The City of Halifax* (1920), 50 D.L.R. 435 (N.S.S.C.). In *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1162, [2003] 3 F.C. 345, aff'd 2003 FCA 482, I considered the two branches that comprise the doctrine of *res judicata*. At paragraphs 20 and 22 I stated:

> **¶ 20** … Although the concepts of *res judicata*, issue estoppel and cause of action estoppel are often intertwined, they have distinct meanings. The principles of these two forms of estoppel can be seen in the two-part definition of *res judicata* cited above and were recently summarized by the Federal Court of Appeal in *Apotex Inc. v. Merck and Co.* (2002), 214 D.L.R. (4th) 429, at paragraphs 24-25:
>
> > The relevant principles behind the doctrine of *res judicata* were established in two leading Supreme Court of Canada decisions: *Angle v. M.N.R.*, [1975] 2 S.C.R. 248 … and *Grandview (Town) v. Doering*, [1976] 2 S.C.R. 621 … In *Angle*, *supra*, at 254 Dickson J. noted that *res judicata* essentially encompasses two forms of estoppel, being "cause of action estoppel" and "issue estoppel," both based on similar policies. First, there should be an end to litigation, and second, an individual should not be sued twice for the same cause of action.

> These two estoppels, while identical in policy, have separate applications. Cause of action estoppel precludes a person from bringing an action against another where the cause of action was the subject of a final decision of a court of competent jurisdiction. Issue estoppel is wider, and applies to separate causes of action. It is said to arise when the same question has been decided, the judicial decision which is said to create the estoppel is final, and the parties to the judicial decision or their privies are the same persons as the parties to the proceedings in which the estoppel is raised.…[Emphasis added.] …
>
> **¶ 22** The applicant submits the Minister is barred from commencing a new inquiry by *res judicata* based on an inadmissibility ground that was known but not advanced in the earlier proceedings. Counsel for the applicant requested the adjudicator stay the proceeding on this basis. The adjudicator ruled the inquiry could proceed because the allegation in the present inquiry was different than those raised in prior proceedings. The adjudicator drew a distinction based on the nature of the inadmissible classes and that both of the earlier proceedings were brought under pre-amendment provisions.

[15] The applicant's argument is framed around the application of either cause of action estoppel or issue estoppel. However, the IAD's decision is limited to the concept of issue estoppel, which is the broader of the two branches of *res judicata*. I agree with the IAD's analysis to the extent that it is issue estoppel that applies to the case at bar. The cause of action before the CRDD, whether the applicant should be granted Convention refugee status, was not the same as the one that was before the ID, which was whether the applicant was inadmissible for reasons of human or international rights violations as described in paragraph 35(1)(a) of the IRPA. A similar finding was made by Mr. Justice Pinard in *Thambiturai v. Canada (Solicitor General)*, 2006 FC 750, [2007] 2 F.C.R. 412, where he stated at paragraph 21:

> **¶ 21** It is clear that "cause of action estoppel" is not applicable here. The cause of action before the RPD, whether the application to vacate the applicant's status should be allowed, was not the same as the one that was before the Immigration Division, which was whether the applicant is a person described in paragraphs 36(1)(*c*) and 40(1)(*a*) of the IRPA, and thereby inadmissible to Canada because of serious criminality and misrepresentation.

[16] In considering the concept of issue estoppel, the question must be whether the IAD was correct in finding that the preconditions had not been satisfied. The preconditions of issue estoppel have been addressed by the Supreme Court of Canada on numerous occasions (*Angle v. M.N.R.*, [1975] 2 S.C.R. 248; *Danyluk*, above; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77). In *Al Yamani*, above, I concluded that the three preconditions of issue estoppel are:

1. that the same question has been decided;
2. that the judicial decision which is said to create the estoppel is final; and
3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

Same Question

[17] The applicant contends that the issue of whether he is inadmissible under paragraph 35(1)(a) of the IRPA has already been addressed on two separate occasions: 1) upon his arrival in Canada where an immigration officer at the port of entry turned his mind to the categories of admission under the former Act; and 2) at the CRDD hearing where the applicant was determined to be a Convention refugee. With respect to the CRDD hearing, the applicant states that he would not have been determined to be a Convention refugee if he had committed acts described in paragraph

35(1)(a) of the IRPA, since commission of those acts would have resulted in his exclusion from the Convention on the basis of article 1(F).

[18] I disagree with the applicant's interpretation. In the refugee hearing before the CRDD, the issue of whether the applicant was inadmissible to Canada was not raised, so the concepts of issue estoppel and *res judicata* do not apply. The applicant has never been subjected to an admissibility hearing to determine whether he is inadmissible under paragraph 35(1)(a) of the IRPA or, for that matter, any other ground of inadmissibility contained within the legislation. Further, while the notice from CIC dated August 23, 1997 makes clear that the applicant has met the eligibility requirements for permanent resident status, nowhere does it say that the applicant has been determined to be admissible to Canada. These are two separate decisions that must be made with respect to the applicant's permanent residence application. As well, the determination of whether the applicant is a Convention refugee – the question before the CRDD – is substantially different from the determination of whether the applicant is admissible for the purpose of becoming a permanent resident.

[19] As the record shows, at no point between 1997 and 2003 is a final decision made regarding the applicant's admissibility for the purposes of his permanent residence application. Accordingly, the preconditions of issue estoppel have not been satisfied and the applicant has not established that the IAD erred in reaching its decision to allow the Minister's appeal. On this basis alone, this application for judicial review must be dismissed.

Same Parties

[20] At the admissibility hearing, the ID concluded that while the Minister and the CRDD were not the same parties as defined in Rule 2 of the CRDD Rules (now the *Refugee Protection Division Rules*, S.O.R./2002-228), the Minister could nevertheless be seen as a "privy" to the CRDD decision because there was an "identification of interest between the Minister and the CRDD … with respect to matters of exclusion."

[21] The IAD found this reasoning "troublesome," concluding that it was an error to find an identity of interest since the CRDD, as a division of the Board, is an independent tribunal. That independence, the IAD concluded, would be compromised if it was seen as a "privy" to the Minister.

[22] The respondent agrees with the IAD's conclusion, and submits that the RPD (and the CRDD before it) has always been an "independent tribunal independent of the Minister and certainly not bound by the Minister's position." The respondent further submits that no identity of interest exists between the Minister and the RPD, as the RPD does not represent the interest of any party, but rather, has a statutory mandate to decide those matters before it on the basis of the evidence and argument before it.

[23] The applicant, however, disagrees with the reasoning of the IAD and argues that the Minister was a party to the original proceedings because it had the opportunity to attend those proceedings, even though it chose not to do so. Because the Minister had a "full and fair opportunity

to be heard" at the refugee hearing, the applicant argues that the Minister is bound by estoppel from subsequently addressing the applicant's admissibility before the ID.

[24] The applicant further contends that even if the Minister was not a party to the CRDD hearing, it is at least a privy to the CRDD hearing on account of the fact that there exists "a clear community or privy of interest between the Minister and the CRDD regarding whether the Applicant committed the acts described in section 35(1) of *IRPA*."

[25] I cannot agree with the applicant's position that the Minister was either a party at the refugee hearing, or that the Minister is a privy of the CRDD. As the IAD made clear in its decision, the Minister "can only intervene in a refugee hearing to seek the exclusion of a claimant from refugee protection. It is the CRDD that has jurisdiction to decide [whether] the Minister has made a case for exclusion": IAD Decision at paragraph 18. In those situations where the Minister acts as a party before the RPD, the RPD must consider the Minister's evidence and submissions, but no more so than the claimant's evidence and submissions.

[26] Further, the Supreme Court of Canada has clearly stated that a person cannot be seen as a party to a previous proceeding even where he or she had an option of intervening in the matter: *London Loan & Savings Co. of Canada v. Osborn*, [1928] S.C.R. 451. This principle was followed by the Ontario Court of Appeal in *Berge v. Langlois* (1984), 6 D.L.R. (4th) 766.

[27] Accordingly, since neither the first nor third preconditions for issue estoppel have been met, the IAD was correct in allowing the Minister's appeal and remitting the matter to the ID for reconsideration of the applicant's admissibility.

Scheme of the IRPA

[28] Under the IRPA, once a person is found eligible for permanent resident status, the person must meet the admissibility requirements of the law, which include both medical and security screenings. These checks involve investigation and take time. Accordingly, the logistical scheme of the legislation suggests that admissibility would not be determined until after the applicant has been determined to be a Convention refugee in the normal course. Further, just because the applicant has been found to be a Convention refugee in the normal course, does not mean that he is entitled to permanent resident status. As Madam Justice Layden-Stevenson explained in *Khalil v. Canada*, 2007 FC 923, [2007] F.C.J. No. 1221 (QL) at paragraphs 185-187:

> **¶ 185** The overarching parliamentary intent of the IRPA is articulated in subsection 3(3) which states that the act is to be construed and applied in a manner that furthers the domestic and international interests of Canada.
>
> **¶ 186** The right relied upon by the plaintiffs in subsection 21(2) of the IRPA (that upon application in accordance with the regulations, a Convention refugee becomes a permanent resident) is subject to an important qualification. A Convention refugee is eligible for permanent residence only if the refugee is not inadmissible. If inadmissible, permanent residence can be granted only by ministerial exemption. As noted earlier, the power to grant ministerial exemption is non-delegable.
>
> **¶ 187** Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada: *Chiarelli v. Canada (Minister of Employment and Immigration)*,

> [1992] 1 S.C.R. 711 at pp. 733-734…. In so doing, it is acting in the public interest.
>
> [Emphasis added.]

[29] In cases where the refugee claimant is well known for some reason related to inadmissibility, the Minister may intervene before the CRDD (now the RPD) and argue that the claimant is not eligible to be a Convention refugee. However, that is not what happened in the case at bar.

Issue No. 2: <u>Did the IAD err in concluding that there existed sufficient reasons to exercise its discretion in refusing to apply issue estoppel?</u>

[30] The applicant submits that the administrative decision-maker does have the discretion to refuse to apply the estoppel. The exercise of that discretion is to be reviewed by the Court on a standard of patent unreasonableness. In this case, however, the preconditions of issue estoppel have not been satisfied, making consideration of this issue unnecessary.

[31] As part of the discretion issue, the applicant submits, in any event, that allowing the ID hearing to proceed would amount to an abuse of process based on the unconscionable and undue delay associated with the processing of the applicant's application for permanent residence. The applicant relies on the Supreme Court of Canada's decision in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, where it stated at paragraph 154:

> **¶ 154** Abusive administrative delay is wrong and it does not matter if it wrecks only your life and not your hearing. The cases that have been part of this evolution have sometimes expressed the point differently, but the key consideration is this: administrative delay that is determined to be unreasonable based on its length, its causes, and its effects is abusive and contrary to the administrative

> law principles that exist and should be applied in a fair and efficient legal system.

[32] In the case at bar, the record discloses that the Minister repeatedly assigned a "low priority" to interviewing the applicant with respect to his admissibility, and failed to appear at the Assignment Court hearing before the ID when this case was originally to be scheduled. In the meantime, the applicant had been in Canada for six years from the time he was determined to be a Convention refugee until he was notified that his admissibility was being questioned. Significant prejudice to the applicant may be considered in assessing whether further proceedings constitute an abuse of process. However, the threshold to prove such prejudice is high. I accept that the applicant has suffered by the delay and that this delay has been unreasonable. However, in the context of the compelling public interest that Canada not admit immigrants who have committed crimes against humanity, the overwhelming priority is that the ID consider the admissibility of the applicant on the merits: See the Federal Court of Appeal decision in *Al Yamani*, above, per Rothstein J.A. at paragraphs 34-40.

[33] Accordingly, the IAD was not patently unreasonable in concluding that the "tardiness" of the Minister does not outweigh the public interest of preventing those convicted of war crimes or crimes against humanity from being allowed to seek refuge in Canada. The applicant could have sought mandamus to require the Minister to proceed with reasonable dispatch on his admissibility.

COSTS

[34] The applicant seeks costs for this application in any event of the cause. Section 22 of the *Federal Courts Immigration and Refugee Protection Rules*, S.O.R./2002-232 provides that the Court may award costs in an immigration matter if there exists "special reasons." The Court is not satisfied that "special reasons" are present that warrant granting costs to the applicant. In this application, which deals with whether the IAD was correct in not applying the issue estoppel branch of *res judicata*, an award of costs would be inappropriate as the respondent is not responsible for delaying these proceedings given the nature of the applicant's argument. I think that a delay beyond two years, notwithstanding that the applicant was a low priority for the respondent, may have been inordinate and unreasonable. However, there is no cause of action for damages in such cases, and the appropriate proactive remedy is mandamus to require that the respondent make a decision within a reasonable time period.

Expedite a new hearing before the ID regarding admissibility

[35] The Court, with the concurrence of both parties, urges the ID to expedite a new admissibility hearing for the applicant. He has waited six years from being determined to be a Convention refugee until his first admissibility hearing before the ID, and has now waited an additional three years while the legal question of *res judicata* and issue esoppel has been appealed to the IAD and to this Court.

CERTIFIED QUESTION

[36] Neither party had a specific question for certification on appeal. The Court is of the view that the legal issues involved in this case have been well established in the jurisprudence, and there is no new serious question of general importance raised in this application that should be certified for an appeal.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

APPENDIX "A"

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Human or international rights violations

35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for

(*a*) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

(*b*) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*; or

(*c*) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association.

(2) Paragraphs (1)(*b*) and (*c*) do not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

Atteinte aux droits humains ou internationaux

35 (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :

a) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;

b) occuper un poste de rang supérieur — au sens du règlement — au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des violations graves ou répétées des droits de la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;

c) être, sauf s'agissant du résident permanent, une personne dont l'entrée ou le séjour au Canada est limité au titre d'une décision, d'une résolution ou d'une mesure d'une organisation internationale d'États ou une association d'États dont le Canada est membre et qui impose des sanctions à l'égard d'un pays contre lequel le Canada a imposé — ou s'est engagé à imposer — des sanctions de concert avec cette organisation ou association.

(2) Les faits visés aux alinéas (1)*b*) et *c*) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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