Date: 20091029

Docket: IMM-4096-08

Citation: 2009 FC 1112

Ottawa, Ontario, October 29, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

AIYAMPILLAI NADARASA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision made by a visa officer at the Canadian High Commission in Colombo, Sri Lanka, refusing the applicant's application for permanent residence under the family class. The applicant was found inadmissible as a result of his misrepresentations, and also for security reasons.

[2] Prior to the hearing of the judicial review application, the Minister of Citizenship and Immigration (the "Minister") applied under s. 87 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "*IRPA*") for the non-disclosure of information considered and relied upon by

the Officer in making his determination. This information was redacted from the Certified Tribunal Record. The *ex parte* and *in camera* hearing of that motion was held on May 28, 2009. Subsequently, counsel for the applicant and for the Minister were invited to make submissions publicly, by way of teleconference, which took place on June 1, 2009. I then ordered that the motion of the respondent be granted and that the information redacted from the Certified Tribunal Record not be disclosed to the applicant and the public. The following reasons deal with both the Minister's motion for non-disclosure and with the merits of Mr. Nadarasa's application for judicial review.

BACKGROUND

[3] The applicant is a 72 year old citizen of Sri Lanka. In January 2005, the oldest of his two sons, Vimalan, now a Canadian citizen, filed an application to sponsor him to Canada as a member of the Family Class. Following the tsunami in South-East Asia, his son's application to sponsor him was fast-tracked. After his son was determined to be eligible to sponsor him on January 14, 2005, the application was forwarded to the Canadian High Commission in Colombo in July 2005.

[4] In February 2007, the applicant and his wife attended a first interview at the High Commission. There is no record of that interview, but according to the affidavit filed by the applicant in support of his application for judicial review, he was questioned about his education, employment, and the activities of the Tamil Tigers ("LTTE") in the districts where he was living and working throughout the course of his career. He apparently denied, personally and on behalf of his family, any involvement in the LTTE.

[5] Almost one year later, he was contacted and requested to attend another interview on February 5, 2008. As was the case in the first interview, he was questioned about his employment history with the Sri Lankan government. According to the CAIPS notes, the Officer mentioned to the applicant that he found it hard to believe that the LTTE would not interfere with his duties, even when he was issuing permits to allow persons without land to acquire and cultivate pieces of land, since this was the territory under their control. The applicant simply retorted that his rulings were accepted, and that the LTTE must have acquired lands from other people by using other methods. The Officer similarly challenged the applicant's affirmation that he was never approached for money by the LTTE when he was an administrator responsible for the payment of staff salaries; the applicant's explanation was that the LTTE collect tax mostly from landlords and those engaged in business.

[6] Following that portion of the examination, the applicant was then asked questions about the difficulties his children faced from the LTTE. The applicant stated that the police captured his youngest son, Vickraman, and detained him for three years because he was suspected of being a LTTE member. The applicant claimed that his son had no interaction with the LTTE, and that his son never cleared forests, filled sandbags or took photographs for the LTTE. The applicant also claimed that he was aware of his son's activities at all times and that his son never went out. The Officer mentioned to him that his version of events "conflicts greatly with the statements Vickraman made in Canada".

[7] The Officer then asked the applicant whether he and his family had ever been displaced. He replied that from 1996 to 2002, they were displaced from Kilinochchi to Akarayam. The applicant was asked why this period of residence was not mentioned in his application. The applicant replied that he only put his mailing address, as he only considered this address to be important. The Officer pointed out that the application refers to addresses where he lived.

[8] The Officer asked the applicant what happened to his home during his displacement. He stated that he had rebuilt his home in 2002, and would go back to check on it once a month. He did not move back to his house and rented it to someone he knew. The Officer asked about the person who rented his house. He said a teacher rented it, whereas in his previous interview, he had said that the LTTE had taken over his house. Again, there was some confusion in this respect, and the name of the renter provided by the applicant was different from the name he provided in the last interview.

[9] Again, the applicant was asked which of his sons worked for the LTTE. The applicant answered Vickmaran, but then quickly checked himself and said his sons had never worked for the LTTE, that the police only suspected his youngest son of working for the LTTE. The Officer pointed out that this was a problem because Vickmaran clearly stated to Canadian officials that he did work for the LTTE.

[10] The Officer told the applicant that he found it impossible that he would have been unaware that Vickmaran was working three to four times a week for the LTTE. The applicant was distressed

by this, and said that he may not have known what his sons were doing as he was working all day. Yet, the Officer pointed out to the applicant that he had previously claimed to know for sure what his sons were doing.

[11] The Officer subsequently told the applicant that he believed he was not being truthful about this and several other things related to his own work and interactions with the LTTE, and that he was misrepresenting himself with respect to knowledge of his youngest son's activities and with respect to his own interactions with the LTTE. He told him that his misrepresentations could have resulted in an error in the administration of the Act, and that the applicant was therefore inadmissible under s. 40 of the *PRRA*. He also stated that he had serious concerns that there may be undisclosed information which could render the applicant inadmissible under section 34 of the *IRPA*. All that the applicant said was that he was disappointed by the decision, but he offered no other response to the Officer's concerns.

[12] According to a redacted Canadian Security Intelligence Service ("CSIS") report on the applicant, which the Officer had presumably seen before the second interview, Vickraman was interviewed by CSIS in Canada and he clearly avowed that he worked for the LTTE between 1992 and 1996 while he lived with his father. He helped the LTTE three or four times a week by digging ditches, filling sandbags and taking photos. He also worked as a sentinel for the LTTE in Kilnochchi. He affirmed that he was convinced that the use of violence was necessary to attain the objectives of the LTTE. According to an undated note in the Certified Tribunal Record, this

youngest son of the applicant was facing a deportation order following a negative Pre-Removal Risk Assessment.

THE IMPUGNED DECISION

[13] In his refusal letter the Officer apprised the applicant of his assessment that he did not qualify as a member of the Family Class, essentially on the basis of his misrepresentations. The most relevant part of that letter reads as follows:

> At your interview on the 5th of February 2008, you misrepresented or withheld the following material facts:
>
> - Details about family interaction with the LTTE
> - Places of residence
> - Renters of your properties
>
> The misrepresentation or withholding of these material facts induced or could have induced errors in the administration of the Act, as by misrepresenting personal and family background information, you were denying me a line of questioning regarding your admissibility, which could have resulted in me reaching an incorrect admissibility decision.
>
> As a result, you are inadmissible to Canada for a period of two years from the date of this letter. In addition, as a result of your multiple misrepresentations, I am not satisfied you are also not admissible from a security perspective.

ISSUES

[14] The applicant raises essentially two questions in his application for judicial review. First, he submits that the Visa Officer breached a principle of natural justice in basing his decision on extrinsic evidence to which he had no ability to respond. Second, he argues that the reasons for the decision are inadequate, and couched in vague or general terms.

[15] Both of these issues must be assessed against the standard of correctness. Issues of procedural fairness must be reviewed as issues of law, and no deference is due on these questions. As the Federal Court of Appeal stated in *Sketchley* v. *Canada (A.G.)* 2005 FCA 404, at para. 53, "[t]he decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty".

[16] But first, I shall deal with the motion brought by the respondent pursuant to s. 87 of the *IRPA*.

ANALYSIS

A) The motion for non-disclosure

[17] The state has a considerable interest in protecting national security and the security of its intelligence services. The disclosure of confidential information could have a detrimental effect on the ability of investigative agencies to fulfil their mandates in relation to Canada's national security: see *Almrei* v. *Canada (Minister of Citizenship and Immigration)*, 2004 FC 420, at para. 58; *Chiarelli* v. *Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 744-746. Indeed, this Court recognized in *Henrie* v. *Canada (S.I.R.C.)*, [1989] 2 F.C. 229, that information related to national security ought not to be disclosed is an important exception to the principle that the court process should be open and public.

[18] The Supreme Court of Canada and other courts have repeatedly recognized the importance of the state's interest in conducting national security investigations and that the societal interest in national security can limit the disclosure of materials to individuals affected by the non-disclosure. In *Ruby* v. *Canada (Solicitor General)*, [2002] 4 S.C.R. 3, the Court encouraged a deferential standard of judicial review if the Minister is able to demonstrate that disclosure reasonably supports a finding of danger to Canada's security.

[19] The rationale underlying the need to protect national security information has been considered by this Court in the context of immigration cases: see, for ex., *Sogi* v. *Canada (Minister of Citizenship and Immigration)*, 2003 FC 1429; affirmed 2004 FCA 212; *Gariev* v. *Canada (Minister of Citizenship and Immigration)* 2004 FC 531; *Alemu* v. *Canada (Minister of Citizenship and Immigration)* 2004 FC 997; *Segasayo* v. *Canada (Minister of Public Security and Emergency Preparedness)*, 2007 FC 372; *Malkine* v. *Canada (Minister of Citizenship and Immigration)*, 2009 FC 496; *Rajadurai* v. *Canada (Minister of Citizenship and Immigration)*, 2009 FC 119.

[20] In the present case, the Minister claims that the disclosure of the redacted portions of the Certified Tribunal Record (the "CTR") would be injurious to national security or endanger the safety of certain individuals. The applicant, on the other hand, contends that the information redacted from the Record impedes his ability to know and comprehend the case that he has to meet.

[21] Having carefully reviewed the information redacted from the CTR and contained in the secret affidavit and the attachments thereto, for which the respondent requests an order for non-

disclosure, I have concluded that it falls squarely within the net of information which, if released, would be injurious to the national security of Canada and endanger the safety of persons and therefore ought not to be disclosed to the public or the applicant and his counsel. In the specific circumstances of this case, the applicant's right to know does not counterbalance the important national security interest relied upon by the respondent.

[22] First of all, as was the case in many of the cases referred to at paragraph 19, the applicant is not detained and his liberty interest is not at stake, contrary to the situation of persons subject to a security certificate. Indeed, the applicant does not even reside in Canada, and he cannot therefore claim that any of the rights proclaimed in the *Canadian Charter of Rights and Freedoms* have been infringed by the non-disclosure of some information.

[23] Moreover, the redacted portion of the CTR is minimal, and I am satisfied that it does not affect his ability to make his case. The decision was not made on the basis of information not communicated to the applicant, and the crux of the Visa Officer's concerns was explicitly conveyed to the applicant. As he acknowledges in his affidavit, he was made aware more than once that his and his family's interactions with the LTTE were at the root of the Visa Officer's suspicions. He was told that his story did not match his youngest son's version. As a result, I am unable to find that the redactions of the CTR sought by the respondent prejudiced in any significant way the capacity of the applicant to make representations and to participate fully and meaningfully in his application for judicial review of the challenged decision.

B) The use of extrinsic evidence

[24] The applicant submits that the Visa Officer breached a principle of natural justice because he based his decision on extrinsic evidence to which he had no ability to respond. More particularly, the applicant argues that the Officer never presented to him the evidence upon which he relied to intimate that the applicant's youngest son had admitted working for the LTTE. As a result, he could not address this apparent contradiction directly and was left expressing his distress when told about his son's activities by the Officer.

[25] But contrary to the applicant's submission, the jurisprudence of this Court is not to the effect that an applicant must actually be given the document relied upon by the decision-maker, but that the information contained in that document be disclosed to the applicant so that he or she has an opportunity to know and respond to the case against him or her. The following quote from Justice Rothstein (then from this Court) in *Dasent* v. *Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 720, at para. 23, is illustrative of that principle:

> The relevant point as I see it is whether the applicant had knowledge of the information so that he or she had the opportunity to correct prejudicial misunderstandings or misstatements. The source of the information is not of itself a differentiating matter as long as it is not known to the applicant. The question is whether the applicant had the opportunity of dealing with the evidence. This is what the long-established authorities indicate the rules of procedural fairness require. In the well known words of Lord Loreburn L.C. in *Board of Education v. Rice*, [1911] A.C.179 (H.L.) at page 182:
>
> > They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

> See also: *Muliadi* v. *Canada (Minister of Employment and Immigration)*, [1986] 2 F.C. 205 (F.C.A.); *Chen* v. *Canada (Minister of Citizenship and Immigration)*, 2007 FC 41; *Knizeva* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 268.

[26] It is worth noting that Citizenship and Immigration Canada Overseas Processing Manual states that applicants must be provided with an opportunity to disabuse an officer of any concerns. The Procedures chapter of that Manual (OP 1) states the following:

> Applicants must be allowed to bring evidence and to make an argument. This includes being provided with adequate translation/interpretation. Officers must consider all the evidence and must record (in CAIPS) what they based their assessment on, and why they did not consider some of the evidence. Officers must meet this requirement in all cases, but to different degrees. The opportunity should be proportionate to the complexity of the application. With visitor visa applicants, officers should express their own concerns and record the applicant's response in the case notes. The applicant must be made aware of the "case to be met," i.e., the information known by the officer must be made available to the applicant prior to the decision being made. For example, if an officer relies on extrinsic evidence (i.e., evidence received from sources other than the applicant), they must give the applicant an opportunity to respond to such evidence. Permanent residence applicants and some visitors may need extra time to address any concerns. The record of the exchange must be more detailed in such cases. When the concern is medical in nature, officers must follow the procedures outlined in OP 15. Officers must also follow specific instructions to assess the occupational experience of skilled workers (see OP 6). Officers should give factual and objective reasons for their decision.

[27] In the case at bar, the applicant stated at his interview with the Officer that his youngest son had never interacted in any way with the LTTE. In response, the Officer confronted the applicant with statements made by Vickraman to Canadian authorities to the effect that he had worked for the LTTE while in Sri Lanka. It is clear from the CAIPS notes that the Officer gave the applicant an

opportunity to respond, and the applicant does not dispute this. I fail to understand what more the applicant could have said had he been given the statements made by his son in writing.

[28] In light of the above, therefore, I find that the Officer clearly did not breach the rules of procedural fairness by failing to disclose extrinsic information to the applicant for comment. The applicant was confronted with the information and failed to provide a reasonable explanation for the contradictions.

C) The adequacy of the reasons

[29] The test of adequacy has been well articulated by the Federal Court of Appeal in *Via Rail Canada Inc.* v. *Lemonde,* [2001] 2 C.F. 25 in the following terms:

> [21] The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "[a]ny attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons" [J.M. Evans et al, *Administrative Law* (4th ed.), Toronto: Emond Montgomery, 1995, at p. 507].
>
> [22] The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors.

[30] The applicant's application for permanent residence was denied due to his inadmissibility for misrepresentation under paragraph 40(1)*(a)* of *IRPA* and due to his failure to provide sufficient credible and trustworthy information to satisfy the Officer that the applicant was not inadmissible pursuant to subsection 11(1) of *IRPA*. In support of his findings, the Officer noted several implausibilities in the applicant's statements, contradictions between his previous statements and those at the most recent interview, and discrepancies between his statements and those of his youngest son particularly relating to his son's involvement with the LTTE.

[31] The contradictions, implausibilities and discrepancies in the applicant's evidence are set out in a detailed and comprehensive manner in the CAIPS notes. These notes fully support the conclusion that the applicant is inadmissible for misrepresentation under paragraph 40(1)*(a)* of *IRPA* and that he failed to provide sufficient credible and trustworthy information to satisfy the Officer that he was not inadmissible pursuant to subsection 11(1) of *IRPA*. The reasons therefore meet the test of adequacy as they inform the applicant why his application was denied and they do not prejudice his ability to seek judicial review. As my colleague Justice Shore stated in *Za'rour* v. *Canada (Minister of Citizenship and Immigration)*, 2007 F.C. 1281:

> [19] The reasons inform Mr. Za'rour why his request was denied and has not prejudiced his ability to seek judicial review. It is well-established that reasons serve the two main purposes of letting the parties know that the issues have been considered and of allowing the parties to effectuate any right of appeal or judicial review. (*Via Rail Canada Inc. v. Lemonde* (C.A.), [2000] F.C.J. No. 1685 (QL); *Townsend v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 371, [2003] F.C.J. No. 516 (QL); *Fabian v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1527, [2003] F.C.J. No. 1951 (QL).)

> [20] Moreover, the Supreme Court of Canada held in *R. v. Sheppard*, [2002] 1 S.C.R. 869, paragraphs 33, 46 and 53, that the inadequacy of reasons is not a free-standing right of appeal, in that, it automatically constitutes a reviewable error. The Court held that "requirement of reasons, in whatever context it is raised, should be given a functional and purposeful approach." Where the record as a whole indicates the basis upon which a trier of fact came to his or her decision, a party seeking to overturn the decision on the basis of the inadequacy of reasons, must show that the deficiency in reasons has occasioned prejudice to the exercise of a legal right to appeal. (Reference is also made to *R. v. Kendall* (C.A.), [2005] O.J. No. 2457.)

[32] Moreover, in spite of the applicant's assertions to the contrary, the Officer's reasons are clear and concise and are in no way couched in vague or general terms. The Officer clearly states that the applicant is inadmissible for misrepresentation under paragraph 40(1)*(a)* of *IRPA* and that he failed to provide sufficient credible and trustworthy information that could satisfy the Officer that the applicant was not inadmissible pursuant to subsection 11(1) of *IRPA*. More specifically, given the numerous and serious misrepresentations "with respect to knowledge of son's activities, and with respect to his own interactions with LTTE", the inadmissibility ground of concern is clearly that of security (CAIPS Notes, Application Record, p. 16).

[33] For the above reasons, I am therefore of the view that this application for judicial review ought to be dismissed. No questions of general importance were proposed for certification, and none arise on the facts of this case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4096-08
STYLE OF CAUSE:	AIYAMPILLAI NADARASA and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 25, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	de Montigny J.
DATED:	October 29, 2009

APPEARANCES:

Mr. Joel Sandaluk	FOR THE APPLICANT
Mr. Jamie Todd	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MAMANN & SANDALUK Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
MR. JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT