Federal Court  Cour fédérale

Date: 20100329

Docket: IMM-4135-09

Citation: 2010 FC 339

Ottawa, Ontario, March 29, 2010

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

NALLIAH THIRUNAVUKARASU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Nalliah Thirunavukarasu challenging a decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada (IAD) which refused his sponsorship application for his wife and accompanying daughter.

I. Background

[2] Mr. Thirunavukarasu entered Canada from Sri Lanka in 1995 and sought refugee status. That claim was denied by the Immigration and Refugee Board of Canada on September 27, 1996. In

1998 Mr. Thirunavukarasu applied for permanent residency status under s. 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*) and that application was approved in principle in May 2001. Because of difficulties obtaining documents, Mr. Thirunavukarasu did not become a permanent resident until January 2005.

[3] When Mr. Thirunavukarasu made his humanitarian and compassionate application in 1998 he declared that his wife and youngest daughter were still in Sri Lanka but that their whereabouts were unknown to him. Apparently he resumed contact with them at some point before he was landed but failed to inform Citizenship and Immigration Canada (CIC) of that change in circumstance. This created a problem for him in 2007 when CIC refused his application to sponsor his wife and daughter for landing on the strength of their inadmissibility as unexamined family members under ss. 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*IRPA Regulations*). It was from this decision that Mr. Thirunavukarasu brought his appeal to the IAD.

II. The IAD Decision

[4] The IAD made a number of factual findings that were very favourable to Mr. Thirunavukarasu and his family. It was prepared to excuse the fact that his wife and daughter had, by their later admission, lied to CIC about whether contact with Mr. Thirunavukarasu had been lost between 1998 and 2004 because of the conflict in Sri Lanka. The IAD also accepted that Mr. Thirunavukarasu's failure to inform CIC of the resumption of contact with his family was an innocent omission. Notwithstanding these findings the IAD held that Mr. Thirunavukarasu failed to

meet his obligation to inform CIC of the current whereabouts of his wife and daughter at some point in time before he was landed. This, in turn, caused the IAD to apply ss. 117(9) of the *IRPA Regulations* which barred Mr. Thirunavukarasu's wife and daughter from landing because they were deemed to be non-accompanying family members who had not been made available for examination. The basis of the IAD's application of this regulatory provision is outlined in the following passage from its decision:

> **[26]** Furthermore, the duty to disclose and the duty to examine should not be comingled. The duty to disclose is squarely with the appellant. Once having made that disclosure the duty is on the visa officer to determine whether to examine or not. It is the fact of disclosure which would permit the visa officer to make an informed decision as to whether to examine or not. In this case, the FOSS notes indicate that CIC considered the examination of the applicants when it was recorded that the applicants' whereabouts were unknown. Clearly the applicants could not be examined. However, the facts before me are that the applicants' whereabouts became known to the appellant prior to his landing. In my view, in-keeping with the case law referred to above, the appellant was under an obligation to inform CIC either before being landed or at the time of being landed, that the applicants' whereabouts were now known. This would have allowed the immigration officer to consider whether or not examination of the applicant and her daughter was required. As stated above, and unfortunately for the appellant it is immaterial whether or not this non-disclosure of their whereabouts was as a result of advertence or inadvertence.
>
> **[27]** Nor am I persuaded by counsel for the appellant's submission that the emphasis in section 117(9)(d) is on disclosure of the "existence" of a family member and that by having disclosed their existence from the very beginning the appellant has complied with the section. In my view, this is a narrow interpretation of sections 117(9)(d) and 117(10) and is incompatible with a common-sense reading of the sections in the context of the underlying policy considerations referred to above. If there is no obligation on the appellant to disclose a change of circumstance prior to being landed then the section 117(10) is potentially meaningless. Furthermore, such an interpretation would be contrary to the decision of the Federal Court in *Fuente* [footnote omitted] by which I am bound.

> **[28]** In summary, I find that the appellant disclosed the existence of the applicants to CIC and that he did not know of their whereabouts at the time of his filing of the application for permanent residence. I further find that on becoming aware of their whereabouts the appellant had an obligation to inform CIC prior to his being landed. Unfortunately, the appellant failed to inform CIC and the applicants are caught by section 117(9)(d).

III. Issues

[5] Did the IAD err in its interpretation of ss. 117(9)(d) of the *IRPA Regulations*?

[6] Did the IAD err by failing to correctly assess Mr. Thirunavukarasu's claim to relief under s. 7 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act*, 1982 (*Charter*)?

IV. Analysis

[7] The issues raised on behalf of Mr. Thirunavukarasu involve points of law which must be reviewed on a standard of correctness: see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 44.

[8] The gist of Mr. Thirunavukarasu's argument, as I understand it, is that the IAD erred in its interpretation of ss. 117(9)(d) of the *IRPA Regulations* by failing to accept that the admissibility of his wife and daughter was irrelevant to his claim to permanent residency status. He argues that no statutory purpose is served by an interpretation of this provision that would require his disclosure of their whereabouts because no concurrent examination of them was required.

[9] The problem with this argument is that it was rejected by the Federal Court of Appeal in *Azizi v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 406, [2006] 3 F.C.R. 118. There the claimant came to Canada as a settled refugee at a time when there was apparently no requirement to examine non-accompanying family members. The claimant failed to disclose the existence of his family to CIC because the only way he could get out of Pakistan was through a scholarship program which required him to be single. As in this case, the claimant argued that the IAD's interpretation of ss. 117(9)(d) was inconsistent with the purposes of the *IRPA* and, in particular, the purpose of family reunification. The Court rejected this argument for the following reasons:

> **16** If Mr. Azizi is correct that there is no legal requirement for non-accompanying family members to be examined at the time of a Convention refugee application for permanent residence in Canada, that circumstance is accommodated by subsection 117(10). The officer will make that determination and paragraph 117(9)(d) will not apply. What is significant however is that subsection117(10) requires that the officer make that decision. That implies that there must be disclosure of the non-accompanying family members at the time of the Convention refugee application.
>
> a. Although the argument was somewhat difficult to follow, Mr. Azizi seems to be saying that paragraph 117(11)(a) supports his argument. However, paragraph 117(11)(a), like ss.117(10), contemplates that there has been disclosure of non-accompanying family members. There would be no reason for the visa officer to inform the sponsor that family members could be examined unless there was such disclosure. The scheme of the *IRP Regulations* is that non-accompanying family members who might later be sponsored for entry to Canada must be disclosed at the time of the application for permanent residence of the sponsor.
>
> […]

> **21** Disclosure is implicitly required under paragraph 117(9)(d) because it deals with the examination of family members by immigration officials. Obviously, family members cannot be examined where there is no disclosure. The explicit reference to disclosure in subsection 141(1) does not detract from the implied disclosure obligation in paragraph 117(9)(d). On the contrary, the explicit reference to disclosure in subsection 141(1)(a) underscores the importance of disclosure in the Canadian immigration procedures.
>
> **22** Mr. Azizi's argument tries to construe the *Regulations* in a manner that excuses nondisclosure by the Convention refugee appellant. That may suit his particular circumstances but it is not in accord with the scheme of the *Regulations*.

[10] For the purposes of applying ss. 117(9)(d) of the *IRPA Regulations*, I fail to see any meaningful distinction between a situation where a claimant fails to disclose the existence of offshore family members and one, like here, where the claimant fails to make a timely disclosure of the newly-discovered whereabouts of family members. While I agree that the former situation will usually involve a deliberate misrepresentation and the latter, as in this case, may arise inadvertently, the effect is the same – CIC loses the option of conducting a timely examination of the non-accompanying family members. The argument advanced on behalf of Mr. Thirunavukarasu effectively ignores the clear language of this Regulation on the strength of a selective view of the purposes of the *IRPA* and I do not accept it.

[11] It was also argued on behalf of Mr. Thirunavukarasu that the failure by the CIC to enquire about his family members in Sri Lanka was effectively a waiver of its right to do so and gave rise to the exception created by ss. 117(10) of the *IRPA Regulations*. For this argument

Mr. Thirunavukarasu relies upon an undated entry in the CIC CAIPS notes stating that “No concurrent processing. Claims O/S dependants unlocatable”.

[12] I am unable to draw any meaningful inference from this notation beyond the point that when it was written the author observed that the whereabouts of Mr. Thirunavukarasu’s wife and daughter were unknown. It is precisely because the CIC was told by Mr. Thirunavukarasu that contact had been lost that he had an obligation to advise it of their whereabouts when that information became known to him. The CIC was under no obligation to inquire and no legal consequence arises from its failure to do so.

[13] The *Charter* argument advanced by Mr. Thirunavukarasu has no merit. Whether or not the IAD misinterpreted the threshold for s. 7 relief or misinterpreted Mr. Thirunavukarasu’s submission, there is nothing in the record to substantiate such a claim. Mr. Thirunavukarasu’s evidence that “my mind is upset” is entirely insufficient to engage the *Charter*, particularly where this lengthy family separation was the result of his decision to leave his family behind in Sri Lanka. The IAD’s conclusion that the *Charter* argument could not be sustained on the evidence before it, therefore, is unimpeachable.

[14] The IAD made the point that Mr. Thirunavukarasu and his family were not without further recourse and could seek to avail themselves of s. 25 of the *IRPA*. The IAD also felt that a strong case for humanitarian and compassionate relief was evident on the evidence before it. I agree with the IAD that the reunification of this family in Canada after many years of separation and hardship

would likely serve the purposes of s. 25 of the *IRPA.* Unfortunately, neither the IAD nor the Court has the authority to compel such an outcome.

[15] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed.

" R. L. Barnes "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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