Federal Court  Cour fédérale

Date: 20101125

Docket: IMM-5376-09

Citation: 2010 FC 1181

Ottawa, Ontario, November 25, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

RAJARATNAM VIMALENTHIRAKUMAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Procedure must not trump substance, otherwise justice could be set aside prior to complete or final analysis by procedural (or technical) sophism:

> [26] … the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain… (Emphasis added).

(*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; specific reference is also made to paras. 20-24 inclusive below).

II. Judicial Procedure

[2] This is an application for judicial review of the Decision of a Visa Officer, dated October 14, 2009, made at the Canadian Embassy, in Paris, France, wherein the Officer refused the Applicant's Application for Permanent Residence in Canada on the grounds that he was inadmissible to Canada pursuant to paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

III. Background

[3] The Applicant, Mr. Rajaratnam Vimalenthirakumar, is a 37-year old Tamil male citizen of Northern Sri Lanka. In 1997 (when he was 24), the Applicant travelled to France and claimed refugee status. He alleges he was persecuted by the Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lankan army. In France, the Applicant was granted refugee status in the year 2000 and has resided therein since 1997 (Applicant's affidavit, Application Record (AR) at pp. 1-2).

[4] In May 2004, the Applicant submitted an Application for Permanent Residence in Canada. He was sponsored by his Canadian wife (whom he married in July 2003). In his Application, the Applicant stated, *inter alia*, that he was a member of the Students Organization of Liberation Tigers (SOLT) in Sri Lanka from 1994 to 1997.

[5] On October 14, 2009, the Officer refused the Applicant's Application on the ground that he was inadmissible to Canada pursuant to paragraph 34(1)(*f*) of the IRPA. In this regard, the Officer

found that the Applicant was a member of an organization, being the LTTE and the SOLT, that there are reasonable grounds to believe, engages, has engaged or will engage in the acts referred to in subsection 34(1)(*b*) (instigating the subversion by force of a government), or paragraph 34(1)(*c*) (terrorism)).

IV. Issue

[6] Has the Applicant demonstrated that the Officer's Decision is unreasonable?

V. Standard of Review

[7] Given the factual elements present in questions of membership in an organization and the expertise that officers have when assessing the facts against the inadmissibility criteria, the standard of review for the Officer's Decision that the Applicant is inadmissible pursuant to paragraph 34(1)(*f*) of the IRPA, is that of reasonableness. Judicial deference to such decisions remains appropriate. A decision reasonably open to an officer, demonstrating justification, transparency and intelligibility within the decision-making process and falling with a range of possible, acceptable outcomes, should be upheld by this Court (*Saleh v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 303, 363 F.T.R. 204 at paras. 15 and 20; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 97).

VI. Pertinent Legislative Provision

[8] Paragraphs 34(1) (*b*), (*c*) and (*f*) of the IRPA provide:

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	**34.** (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

…	[...]
(*b*) engaging in or instigating the subversion by force of any government;	*b*) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
(*c*) engaging in terrorism;	*c*) se livrer au terrorisme;
	d) constituer un danger pour la sécurité du Canada;
…	[...]
(*e*) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or	*e*) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;
(*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*) or (*c*).	*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*) ou *c*).

[9] Subsection 3(1) of the IRPA contains Parliament's intentions and the objectives of the IRPA. Paragraphs 3(1) (*h*) and (*i*) provide:

…	[...]
(*h*) to protect the health and safety of Canadians and to maintain the security of Canadian society;	*h*) de protéger la santé des Canadiens et de garantir leur sécurité;
(*i*) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and	*i*) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;

… [...]

[10] The term “member of an organization” should be given an unrestricted and broad interpretation, as public safety and national security are the most serious concerns of government (*Canada (Minister of Citizenship and Immigration)* (1998), 151 F.T.R. 101, 82 A.C.W.S. (3d) 136 at para. 51).

[11] The person concerned does not need to be significantly integrated in a large measure within an organization before he meets the test for membership. Also, it is not necessary for the person concerned to have personally participated in the acts of terrorism, if he, to his knowledge, in fact, assisted the organization directly or indirectly (*Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 F.C.R. 487 at par. 31; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297, 102 A.C.W.S. (3d) 178 (C.A.)).

[12] The determination of whether an applicant is a “member of an organization that there are reasonable grounds to believe” requires a very low threshold. The burden of proof for a finding of “reasonable grounds to believe” (which applies to questions of fact) is lower than the civil standard of proof. The immigration officer need only have a *bona fide* belief in a serious possibility of membership, based on credible evidence (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 at paras. 114-116; *Chiau*, above, at para. 60).

VII. Analysis

[13] The Court is in complete agreement with the position of the Respondent.

[14] The onus was on the Applicant to provide sufficient evidence to satisfy the Officer that he was admissible to Canada. The Applicant failed to satisfy the Officer of such, namely, that he was not a member of an organization, being the LTTE and the SOLT, that there are reasonable grounds to believe, engages, has engaged or will engage in the acts referred to in paragraph 34(1)(*b*) of the IRPA (instigating the subversion by force of a government), or paragraphs 34(1)(*c*) of the IRPA (terrorism). It is significant to note that the Applicant admitted in his Application for Permanent Residence and throughout the proceedings that he was a member of the SOLT (Decision, Court Tribunal Record (CTR) at pp. 35-36; Translated CAIPS Notes; Application for Permanent Residence, CTR at pp. 2-15).

[15] Based on a number of significant discrepancies, contradictions, and implausibilities in the Applicant's narrative and his involvement with the SOLT, the Officer found that the Applicant was not credible. These credibility findings were based on specific evidence, before the Officer and, therefore, open to the Officer to make (Translated CAIPS Notes).

[16] In *Kazimirovic v. Canada (Minister of Citizenship and Immigration)* (2000), 98 A.C.W.S. (3d) 1276, [2000] F.C.J. No. 1193 (QL) (T.D.), a visa officer denied the applicant's visa application as a result of credibility concerns with the applicant's narrative concerning his lack of knowledge of atrocities committed while he was in the military. On judicial review, the Federal Court found the visa officer's decision to be reasonable. The Court stated that the burden rested with the applicant to convince the visa officer of his admissibility to enter Canada, and the applicant, having given what

the officer considered to be an unbelievable narrative relating to his military service, simply failed to discharge it.

[17] The same reasoning applies herein. The burden was on the Applicant to convince the Officer that he was not a member of an organization, being the LTTE and the SOLT, that there are reasonable grounds to believe, engages (or has engaged or will engage) in the acts referred to in paragraph 34(1)(*b*) of the IRPA (instigating the subversion by force of a government), or paragraph 34(1)(*c*) of the IRPA (terrorism). The Applicant failed to discharge that burden. The Officer considered the Applicant's explanations and rejected them. The Officer's findings were reasonably open to him on the evidence (Decision, CTR at pp. 35-36; Translated CAIPS Notes).

[18] The Applicant submits that the Officer had made a positive decision and found him to be admissible to Canada. In effect, the Applicant is asserting that the Officer was *functus* when he stated in the CAIPS Notes that the Applicant is not inadmissible. Contrary to the Applicant's submission, at no time, did the Officer or anyone else at the Canadian Embassy make a positive decision in favor of the Applicant or determine that he was admissible to Canada. The Officer only made an initial or preliminary finding that the Applicant appeared admissible; however, no decision was made, no visa was issued and the Officer continued to process the application (Affidavit of Denis Crepault at para. 6).

[19] The fact that the Officer did not make a decision (until February 16, 2009) is evidenced by the fact that on February 16, 2009 (the day which the Applicant submits a decision was made), the Officer requested updated documents from the Applicant and continued to process the Application (Translated CAIPS Notes).

[20] The caselaw provides that the visa officer has the jurisdiction to change or reverse an initial or preliminary finding that the Applicant appeared admissible. In fact, even if the Officer had made a decision that the Applicant was admissible, which is strongly denied, he (and/or another Officer) would have the jurisdiction to change that decision, prior to the issuance of the visa.

[21] For instance, in the case of *Brysenko v. Canada (Minister of Citizenship and Immigration)* (2000), 193 F.T.R. 129, 99 A.C.W.S. (3d) 1035, a visa officer interviewed the applicant for permanent residence and made a positive selection decision. The application was complete, with the only remaining step being the issuance of a visa. Approximately two months later, a second visa officer reviewed the file and found that she was not comfortable with the first visa officer's decision. The second visa officer asked the applicant to provide her with further information. The applicant did not do so. Instead, she filed an application for judicial review arguing that the second visa officer could not reopen the decision, because the first visa officer was *functus*. The Federal Court, per Justice Barbara Reed, found that the second visa officer (who was charged with issuing the visa) had the jurisdiction to reverse the earlier assessment and refuse the application. Justice Reed concluded that the doctrine of *functus* did not apply to the first decision and held that the principle of *functus* only applies to final decisions, and the final decision is the issuance of a visa.

[22] A similar case is the decision in *Park v. Canada (Minister of Citizenship and Immigration)* (1998), 143 F.T.R. 35, 77 A.C.W.S. (3d) 620; affirmed 2001 FCA 165, 106 A.C.W.S. (3d) 325, wherein a visa officer informed the applicant that the processing of his application was complete and that "we are prepared to issue the immigrant visas upon receipt of copies of your passports".

The applicant promptly provided copies of his passports to the Embassy. Some time later, the visa officer discovered the applicant had been convicted of a crime and concluded that he was inadmissible for criminality. The applicant brought an application for judicial review and argued that once a decision to issue an immigrant visa is taken, the visa officer is *functus*. The Federal Court and Federal Court of Appeal concluded that the doctrine of *functus* had no application to the visa officer's reversal of his own inadmissibility finding made earlier in the case and that the visa officer is not *functus* once a decision to issue an immigrant visa is made.

[23] Another similar case is the decision in *Lo v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1155, 229 F.T.R. 145, wherein this Court was asked to determine whether a visa officer has jurisdiction to reconsider the inadmissibility decision of another visa officer. In *Lo*, this Court determined that a visa officer could change an inadmissibility finding of another visa officer prior to the issuance of a visa, even where there is no new information, where the second visa officer disagrees with the former visa officer's inadmissibility analysis. In concluding that the visa officer was not *functus officio*, this Court stated that "visa officers must retain the discretion to look at previous decisions in order to ensure immigrants are not inappropriately allowed into Canada".

[24] Thus, the caselaw has settled the issue of whether a visa officer has the jurisdiction to change an interlocutory decision made prior to the issuance of a visa. Clearly, this proposition applies with much greater tone where a visa officer merely makes an interim or preliminary finding that the applicant appeared admissible, and no visa was issued.

[25] The Applicant submits that the Officer misapprehended the test in determining inadmissibility and that the decision is unintelligible, as the Officer stated (twice in the CAIPS Notes) that he had "reasonable doubts to believe". Paragraph 34(1)(*f*) of the IRPA provides "reasonable grounds to believe" (Emphasis added).

[26] It is noted that in the Officer's Decision, he uses the words "reasonable grounds to believe". In the CAIPS Notes, the Officer uses the words "reasonable grounds to believe" twice, and the words "reasonable doubts to believe" twice (Decision, CTR at pp. 35-36; Translated CAIPS Notes).

[27] The Officer's use of the words "reasonable doubts to believe" is not evidence that the Officer applied the wrong test. It is clear from a contextual reading of the Decision and Reasons as a whole, that the Officer was aware of and applied the correct test under the IRPA (Decision, CTR at pp. 35-36; Translated CAIPS Notes).

[28] The Federal Court of Appeal confirmed in *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 F.C. 555, that the particular words chosen by an Officer in deciding an application are not determinative. What is determinative is that the Officer apply the correct test, which he did in the case at bar.

[29] The Officer's Decision and Reasons are intelligible and provide the Applicant with the opportunity to challenge them. To accept the Applicant's submission would be to place form over substance (Decision, CTR at pp. 35-36; Translated CAIPS Notes).

[30] Although the Officer did not state the specific grounds under subsection 34(1) of the IRPA in his Decision, he did state the specific grounds in his Reasons in the CAPIS Notes. The specific grounds are paragraph 34(1)(*f*) of the IRPA, for being a member of an organization that there are reasonable grounds to believe, engages, has engaged or will engage in the acts referred to in paragraph 34(1)(*b*) of the IRPA (instigating the subversion by force of a government), or paragraph 34(1)(*c*) of the IRPA (terrorism) (Decision, CTR at pp. 35-36; Translation CAIPS Notes).

[31] The Officer's Decision and Reasons are intelligible and provide the Applicant with the opportunity to challenge them. In fact, the Applicant received the translated CAIPS Notes and Reasons in January 29, 2010, which was 30 days before he filed his Memorandum of Argument. To accept the Applicant's submission would be to place form over substance, negating the very essence of justice by using a procedural issue to set aside findings based on evidence before the Officer (Decision, CTR at pp. 35-36; Translated CAIPS Notes).

[32] There is no evidence or merit to the Applicant's argument that the Officer based his decision only on the evidence collected from the interview and on his knowledge of Sri Lanka. It is trite law that the Officer is presumed to have considered all of the evidence and does not have to mention all of the evidence that he considered. The Officer's Decision and Reasons are reasonable and are based on the evidence (Decision, CTR at pp. 35-36; Translated CAIPS Notes).

[33] Contrary to the Applicant's submission that he was denied natural justice, the Applicant received Notice on September 28, 2009, that he was required to attend an interview at the Canadian

Embassy in Paris (on October 14, 2009) to assess his application and to determine whether he meets the criteria for admission to Canada (Letter dated September 28, 2009, CTR at pp. 37-38).

[34] Even if the Applicant was denied natural justice, which is strongly denied, the Applicant has waived his right to complain about this matter, as he did not object to this matter at the interview or beforehand (*Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, [2001] 4 F.C. 85).

[35] With respect to the doctrine of legitimate expectations, there is no evidence that a representation was made by the Respondent that the Applicant was admissible to Canada. Although the Applicant alleges that he "was aware that the Embassy had, sometime in early 2009 made a positive decision finding him to be admissible to Canada", there are no documents from the Embassy or elsewhere advising the Applicant of this matter. Even if there was a representation, which is denied, the representation would have had to be clear and unambiguous for the doctrine to apply (*Monsanto Canada Inc. v. Superintendent of Financial Services*, [2002] O.J. No. 4407, 62 O.R. (3d) 305 (Ont.C.A.) at para. 83).

[36] Moreover, the doctrine of legitimate expectations does not apply in the case at bar, the Applicant is seeking the substantive right to be found admissible and issued a visa; however, the jurisprudence is clear: the doctrine of legitimate expectations does not create substantive rights. The doctrine of legitimate expectations is merely a part of the rules of procedural fairness. Where the doctrine is applicable, it can create a right to make representations or to be consulted, which occurred in the case at bar.

VIII. Conclusion

[37] For all of the above reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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