Federal Court  Cour fédérale

Date: 20110623

Docket: IMM-2706-10

Citation: 2011 FC 754

Ottawa, Ontario, June 23, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

GOWRISHANGAR THANGARAJAH

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of Immigration Counsellor Brian Hudson, (the Officer) of the Canadian High Commission (CHC) in Colombo, Sri Lanka, dated March 15, 2010, wherein the Officer refused Mr. C. Thangarajah's application for permanent residence in Canada because he was not satisfied that Mr. C. Thangarajah and his family were admissible to Canada.

[2] Based on the reasons that follow, this application is allowed.

I. Background

A. *Factual Background*

[3] The Applicant, Gowrishangar Thangarajah, is a Tamil from Northern Sri Lanka who claimed refugee status in Canada in 2001. He applied to sponsor his parents and sister in 2005. The Principal Applicant (PA) for the purpose of this judicial review is the Applicant's father, Mr. C. Thangarajah, a citizen of Sri Lanka. As part of the application process he submitted an application for permanent residence in Canada in December 2007. The PA included his wife and 21 year old daughter as family members (collectively, the Applicants).

[4] The PA also had a younger son, Umashangar, who was 20 years old at the time the application was submitted. The PA, however, did not include Umashangar on the application because he claimed that Umashangar had not lived with the family since the age of eight when he was adopted by the PA's childless brother. Additionally, in 2004 Umashangar allegedly eloped with a woman that neither his adoptive nor biological parents approved of, and left the Jaffna region for Wanni. Since that time the Applicants claim to have had no contact with him, and assume, if he is still alive, that he is living as a spouse in either a common law relationship or marriage.

[5] By letters dated March 4, 2009 and April 20, 2009 the CHC informed the PA that Umashangar was required to be examined and included on the application as a non-accompanying dependent as he was under 22 years old, was not married and was not adopted.

[6] The PA responded to the letters, advising the CHC that the Applicant had decided not to include Umashangar because he had been adopted by his uncle, had run off to Wanni with a girl and had severed all contact with his family. For these reasons, the Applicants sought to exclude him from their application. The CHC responded, advising the PA that Umashangar would nonetheless need to be examined and could not be excluded from the application.

[7] The Computer Assisted Immigration Processing System (CAIPS) notes recording the issuance of the April 20, 2009 letter also notes that the officer, "[had] concerns as to the truthfulness of PA's version of events and the actual whereabouts of son Umashangar…" (Certified Tribunal Record pg 8).

[8] The PA responded by letter dated May 7, 2009 informing the CHC that he did not know the whereabouts of Umashangar, but assumed that he was still living with the girl in Wanni. The PA also noted that at this time, Umashangar was over the age of 22, living in a common law relationship, not pursuing studies and therefore not a dependent child. The CAIPS notes capturing this letter note:

> […] must take a common sense approach on this case. If Umashangar is either common law relationship or marriage, he certainly is no longer a dep. Will proceed with case without examinating Umashangar as he is no longer a dep child (CTR pg 8 and 9).

[9] In the meantime, the PA claims to have become increasingly concerned with Umashangar's well-being as the government began an all-out bombing campaign in Wanni, where he was last known to be living. The PA claims to have read in a newspaper article that someone with the same first name as Umashangar had been brought to a detention camp. In an attempt to locate Umashangar, the PA wrote to the International Commission of the Red Cross (ICRC) for assistance. The ICRC replied that they were unable to help locate individuals in the camps. The PA submitted this letter, dated July 14, 2009 to the CHC.

[10] On February 17, 2010 Case Analyst, Sharon Mark, interviewed the Applicants at the CHC. She made notes during the course of the interview, concluding at the end, "PA was forthcoming with answers. He answered the majority of the questions, even ones directed to his spouse. He clarified the dates in his personal history…" (CTR pg 21). She referred the application to an officer for decision.

B. *Impugned Decision*

[11] On March 8, 2010 the Officer drafted the refusal letter determining that Umashangar was a dependent child and that the Applicants and Umashangar were not admissible. The letter stated in part:

> Having reviewed all of the facts of this case I remain concerned on your admissibility. There were major discrepancies between the application, the interview and the letters submitted by you with regard to your detention and the whereabouts of your son Umashangar. Considering the history of your family I cannot readily conclude that your son Umashangar is not inadmissible, or that the family is inadmissible. As such, I conclude that I do not have a

> complete picture of you and your families [sic] background and I am not satisfied you are not inadmissible to Canada.

[12] The letter was sent to the Applicants on March 17, 2010.

II. Issues

[13] This application raises the following issues:

(a) Does the Applicant have standing to bring this application?

(b) Did the Officer err in finding that Umashangar was a dependent child?

(c) Did the Officer violate the duty of procedural fairness owed to the PA?

(d) What is the appropriate remedy?

III. Standard of Review

[14] The appropriate standard of review to apply to the Officer's decision is reasonableness. Judicial deference to the decision is appropriate when the decision demonstrates justification, transparency and intelligibility within the decision-making process and falls within a range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47). The determination of whether or not Umashangar was a dependent child within the meaning of the statute is also a question of mixed fact and law and ought to be reviewed on a standard of reasonableness (*Skobodzinska v Canada (Minister of Citizenship and Immigration)*, 2008 FC 887, 331 FTR 295 at para 8).

[15] The applicable standard of review to apply to issues of procedural fairness is correctness (*Canadian Union of Public Employees (CUPE) v Ontario*, [2003] 1 SCR 539, 2003 SCC 29 at para 100).

IV. Argument and Analysis

A. *Does the Applicant Have Standing?*

[16] The Applicant submits that as the sponsor he has an evident interest in the litigation and that in many cases before the Immigration Appeal Division (IAD) the sponsor is the appellant.

[17] The Respondent argues that this is not an application for judicial review of a decision made by the IAD, in which situation the sponsor would have had the right to appeal the decision before the IAD and then come to the Court for a review of that decision. Rather, in the present situation the Applicants had no appeal right before the IAD and the Applicant has no standing to challenge the refusal of the application since he is not "directly affected" by the decision. The jurisprudence of this Court supports this position. The Respondent cites *Carson v Canada (Minister of Citizenship and Immigration)* (1995), 95 FTR 137, 55 ACWS (3d) 389 at para 4:

> [4] While Mrs. Carson has an interest in this proceeding, in that she is Mr. Carson's sponsor for landing in Canada and she was interviewed as part of the marriage interview involving the H&C determination, these facts are insufficient to give her standing in this judicial review. Mrs. Carson is a Canadian citizen and does not require any exemption whatsoever from the Immigration Act or regulations. Moreover, whether she has standing or not has no impact whatsoever on the ultimate issue in this matter. Accordingly, with respect to this proceeding, the applicant, Tonya Carson, is struck as a party.

(see also *Wu v Canada (Minister of Citizenship and Immigration)*(2000),183 FTR 309, 4 Imm LR (3d) 145 at para 15).

[18] Accordingly, the Applicant is struck as a party. However, further to the request of both parties, the Court will add the Applicant's sponsored dependents as named Applicants.

B. *Did the Officer Err in Finding that Umashangar Was a Dependent?*

[19] The PA submits that the Officer erred in finding that Umashangar could be treated as a dependent child. Section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 defines the term "dependent child" as:

"dependent child", in respect of a parent, means a child who	« enfant à charge » L'enfant qui:
(a) has one of the following relationships with the parent, namely,	a) d'une part, par rapport à l'un ou l'autre de ses parents :
(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or	(i) soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son époux ou conjoint de fait,
(ii) is the adopted child of the parent; and	(ii) soit en est l'enfant adoptif;
(b) is in one of the following situations of dependency, namely,	b) d'autre part, remplit l'une des conditions suivantes :
(i) is less than 22 years of age and not a spouse or common-law partner,	(i) il est âgé de moins de vingt-deux ans et n'est pas un époux ou conjoint de fait,

(ii) has depended substantially on the financial support of the parent since before the age of 22 — or if the child became a spouse or common-law partner before the age of 22, since becoming a spouse or common-law partner — and, since before the age of 22 or since becoming a spouse or common-law partner, as the case may be, has been a student

(ii) il est un étudiant âgé qui n’a pas cessé de dépendre, pour l’essentiel, du soutien financier de l’un ou l’autre de ses parents à compter du moment où il a atteint l’âge de vingt-deux ans ou est devenu, avant cet âge, un époux ou conjoint de fait et qui, à la fois :

(A) continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and

(A) n’a pas cessé d’être inscrit à un établissement d’enseignement postsecondaire accrédité par les autorités gouvernementales compétentes et de fréquenter celui-ci,

(B) actively pursuing a course of academic, professional or vocational training on a full-time basis, or

(B) y suit activement à temps plein des cours de formation générale, théorique ou professionnelle,

(iii) is 22 years of age or older and has depended substantially on the financial support of the parent since before the age of 22 and is unable to be financially self-supporting due to a physical or mental condition.

(iii) il est âgé de vingt-deux ans ou plus, n’a pas cessé de dépendre, pour l’essentiel, du soutien financier de l’un ou l’autre de ses parents à compter du moment où il a atteint l’âge de vingt-deux ans et ne peut subvenir à ses besoins du fait de son état physique ou mental.

[20] The PA argues that there is no way the Officer could have reasonably come to the conclusion that Umashangar was a dependent since:

- He was given up for adoption at the age of 8,
- He was not financially dependent on his parents before he turned 22, and did not remain financially dependent on them after turning 22,
- He was either married or in a common-law relationship before turning 22, and he entered into that relationship one year before the application was even submitted,
- He was not a dependent child studying full-time in school before he turned 22, and was not a dependent child attending a post-secondary school after turning 22.

[21] Further, the PA submits that the Officer's reasons do not reveal a reasonable basis for his decision to consider Umashangar as a dependent.

[22] The Respondent submits that the Officer reasonably found that Umashangar was a dependent child since he was 20 years old when the application was submitted, he had not been formally adopted, and he was not married.

[23] If the PA's submissions are credible, it is clear that Umashangar would not considered a dependent child, by any criteria. In fact, as the PA submits, an officer at the CHC made a preliminary determination that Umashangar was not a dependent child. So the question I must answer is, was there a reasonable basis for the Officer to disbelieve the PA's submissions?

[24] The Respondent argues that discrepancies arose between the information in the application, the letters previously submitted, and the answers given at the interview. As examples, the Respondent cites the Officer's observations that there were differing stories as to who filled out the application and why Umashangar was not included therein. Furthermore, while the PA submitted that his son was living in a common-law relationship and is not in school, he also submitted that he had not had contact with him for an unspecified period of time. As such the Officer had credibility concerns.

[25] This Court is to take a deferential view of the credibility findings of officers. However, having reviewed the record and the submissions, I am unable to agree with the Respondent that the "story didn't add up". In the Officer's reasons, he noted two concerns with the file, the first regarding the PA's detentions and the second regarding Umashangar.

[26] On the application form the PA listed no detentions. However, in the interview the PA revealed that had been detained many times by the Liberation Tigers of Tamil Eelam (LTTE) when he refused to let his children work for the LTTE. This accords with the Personal Information Form (PIF) submitted by Applicant (the sponsor) as part of his refugee claim in Canada. The PA claimed that he did not list these detentions on the application form because he thought that that question referred to government detentions. The Officer found, "that answer questionable as the question on our application is very clear and makes no mention of "government detention". Detention is detention," (CTR pg 22).

[27] With respect, I do not think it is reasonable to allow a reasonable misunderstanding to completely impeach the PA's credibility. As the PA points out, the PA submitted his son's PIF to the CHC. He was not attempting to hide or omit this information. Moreover, the Officer's description, that the PA described his detentions "when pressed over the course of an interview" does not concur with the notes of the interviewer who described the PA's answers as "forthcoming" (CTR pgs 22 and 21). In my view, the Officer's credibility assessment which largely hinged on the PA's "inconsistent" statements regarding his detentions is unreasonable.

[28] Regarding Umashangar, the Officer noted the following credibility concerns:

> In particular, the PA tells us that the 85 born son was not included as a dependent on the application because the (other) son of the PA decided not to. Later, the PA tells us that the application was not filled out by his son but rather a justice of the peace in SL.
>
> The PA originally tells us that the 85 son is living with a young girl in Wanni (his letter of May 7, 2009) but when later pressed tells us he has searched 11 detainment camps for his son and produces a letter he has written to the Red Cross dated July of 2009. The letter has little credibility and appears to be little more than something written after we pressed to know the whereabouts of this son.
>
> There is no evidence presented regarding the camp search, and if the son is with a girl in Wanni, I cannot understand the search in the first place.
>
> I note as well that the PA concludes that the son is no longer a dependent because he is living common-law and not in school. How he would know this is beyond me. And in any event, I not see how we can draw the same conclusion never having heard directly from this son.

[29] I have some concerns with the logical consistency of some of the Officer's adverse credibility findings. For example, the PA first wrote to the CHC to explain that Umashangar had not been included because the Applicant decided not to include him. The exact meaning of this

phrase is ambiguous at best, and when compared to the second letter sent to the CHC, could just as well mean that the Applicant decided not to include him because he was under the impression that he was not a dependent, as per the *Regulations*.

[30] The PA argues that the Officer displayed a complete misunderstanding of the application process by raising as suspicious the fact that the justice of the peace in Sri Lanka allegedly helped the PA fill out the application form. As the PA submits, it is illogical to consider this to be an inconsistency. The Applicant filled out the sponsorship application, and later the PA filled out the application form he was sent by the CHC with the assistance of a justice of the peace.

[31] The concerns expressed regarding Umashangar's whereabouts are similarly feebly founded. Umashangar allegedly cut-off contact with his family to go off to Wanni with a girl no one approved of. This was the last the family allegedly heard of Umashangar. Subsequent to the PA's letters to the CHC explaining the situation with Umashangar, the PA explains that the government of Sri Lanka began a heavy bombing campaign in Wanni. It is not outside the realm of belief that the PA would still be interested in the well-being of his son, perhaps even more so because the CHC indicated that in spite of the adoption Umashangar would need to be examined. The other conclusions drawn by the Officer are equally speculative.

[32] The person who was best positioned to judge the candour of the PA in the interview, was the interviewer. The interviewer came to a seemingly positive conclusion regarding the PA's credibility. Without contradictions and inconsistencies, it was not reasonable for the Officer to come to a contrary opinion. Speculation will not suffice. The conclusions drawn by the Officer do

not stand up to a somewhat probing examination, and as such I am unable to say that his conclusion that the PA is not credible and that therefore Umashangar is a dependent is reasonable. The judicial review can be disposed of on the basis of this ground alone.

C. *Did the Officer Violate Any Duty of Fairness Owed to the PA?*

[33] The PA submits that the Officer violated natural justice by relying on concerns not put to the PA in the interview, and by overruling the preliminary decision not to consider Umashangar as a dependent. The PA argues that the PA had a legitimate expectation that once the interview was convened on the basis of the decision that Umashangar would not be considered a dependent and once the PA was found credible, a decision to revoke either preliminary decision could not be made without warning.

[34] The Respondent emphasizes that the CAIPS notes entry made on July 2, 2009 reading, "will proceed with case without examinating Umashangar as he is no longer a dep. child" (CTR pg 9) was an initial or preliminary finding and that the visa officer has the jurisdiction to change or reverse such a decision (*Vimalenthirakumar v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1181). The Applicant, on the other hand, submits that that decision was akin to an interim ruling which could not have been revoked without violating natural justice (*Velauthar v Canada (Minister of Employment and Immigration)*, (FCA) May 8, 1992, Court no A-350-90).

[35] Justice Michel Shore determined that the case law of this Court supports the position that a second visa officer can over-rule a preliminary determination in *Vimalenthirakumar*, above, at paras 20, and 21:

> [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.
>
> [Emphasis in original]

[36] In the present matter, the Officer noted in his decision that the earlier finding that Umashangar was not a dependent was only a preliminary finding and that detailed examination and interview revealed further inconsistencies. I have to agree with the Respondent, that the Officer had the jurisdiction to over-turn this preliminary finding (although the Respondent disputes that it could even be considered as such). However, as described above, I do not agree that the interview

revealed major discrepancies that justified an adverse credibility finding. However, there has been no denial of natural justice.

[37] The PA also argues additionally that the Officer's concerns should have been put to the PA in the interview, but once again, I share the view of the Respondent. A decision was made based on all of the information available at the time. Any concerns that the interviewer had were put to the PA at the time of the interview.

D. *What is the Appropriate Remedy?*

[38] The PA's further memorandum dealt solely with the remedy sought. The PA requests an order setting aside the decision of the Officer and requiring the admissibility of the applicants to be redetermined by Citizenship and Immigration Canada's (CIC) National Headquarters within 30 days of the Court's order. The PA also asks that the processing of the Applicants' permanent residence application be completed within a further 60 days in the event that they are determined admissible. In the alternative, the PA requests that the decision of the Officer be set aside and that a new decision be made by another officer within 30 days of the Court's order.

[39] The PA bases this request on a belief that it would be impossible to refer the matter back to the CHC and ensure fair and impartial treatment of the file since the Officer who made the decision is the official in charge of the immigration section. The Applicant relies on the decisions in *Sivapatham v Canada (Minister of Citizenship and Immigration)*, 2010 FC 314, *Bageerathan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 513, and *Gnanaguru v Canada*

(Minister of Citizenship and Immigration) FC Order dated July 12, 2010, IMM-4267-08 and IMM-987-09.

[40] In support of the allegation of reasonable apprehension of bias, the Applicant submitted a supplementary affidavit attached to which were two newspaper articles. The articles referenced allegedly discriminatory comments that the Officer, Brian Hudson, made to a Canadian Delegation while serving as an Immigration Counsellor in Punjab in India.

[41] As the Respondent submits, the allegations of bias are completely unsubstantiated. The Respondent claims that the newspaper articles submitted are completely inappropriate and have no purpose other than making veiled allegations of bias. As I see it, the newspaper articles are completely irrelevant to the present claim.

[42] The Respondent submits that all the cases cited by the Applicant can be distinguished on the facts. I agree. Furthermore, as Justice Yves de Montigny wrote in *Gnanaguru*, above, in which the applicant's counsel asked for the same remedy:

> Despite counsel for the applicant's valiant efforts to the contrary, there is no substance to the allegation that another officer would be under the spell of his superiors or would feel compelled to reach the same decision, nor is there any basis for assuming that the whole office is prejudiced against Tamils.

Although Justice Judith Snider ordered that the reconsideration of the applicants' file take place at National Headquarters in the re-litigation of the same matter in *Gnanaguru v Canada (Minister of Citizenship and Immigration)*, 2011 FC 536, she was careful emphasize at para 39 that:

> [39] […] my decision that this matter should be considered at NHQ should, in no way, be interpreted as a criticism of the Officer.

> In my view, the attacks by the Applicants on this Officer, as set out in their submissions, were unwarranted and not founded on any evidence beyond the fact that the application was, for a second time, refused. The administration of justice is not well-served by such attacks on the reputation and integrity of one of Canada's public servants.

The PA's other requests as to how the redetermination be ordered are similarly inappropriate.

V. Conclusion

[43] Given the above conclusions, this application for judicial review is allowed and the matter will be remitted to another officer at the CHC in Colombo for re-determination.

[44] At the conclusion of the hearing there was some discussion as to a possible question for certification. I issued an oral direction granting the parties two weeks to file submissions with respect to such a possible question. After reviewing the various letters submitted by both the Applicants and the Respondent and given the outcome, it is clear that no question for certification arises in this matter.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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