

Federal Court



Cour fédérale

Date: 20140527

Docket: IMM-634-13

Citation: 2014 FC 509

Toronto, Ontario, May 27, 2014

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

PREMACHANDRAN KANDIAH

Applicant

And

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Premachandran Kandiah seeks judicial review of the decision of a visa officer refusing his application for permanent residence. Mr. Kandiah asserts that he was denied procedural fairness in the processing of his application because he was denied a full opportunity to address the visa officer's concerns with respect to both his admissibility to Canada and his continuing interest in coming to Canada. During the hearing, Mr. Kandiah also raised concerns regarding the reasonableness of the visa officer's decision.

[2] While I agree that the delays in the processing of Mr. Kandiah's application are regrettable, I have not been persuaded that he was treated unfairly by the visa officer or that the decision was unreasonable. Consequently, the application for judicial review will be dismissed.

Background

[3] Mr. Kandiah is a member of the Tamil National Alliance and a member of the Sri Lankan Parliament. His wife and children were accepted as refugees in Canada in 2004. Mr. Kandiah's wife then applied to sponsor him as a member of the refugee abroad class. This application was filed in January of 2004.

[4] While there was some internal communication within the Government of Canada over time with respect to Mr. Kandiah's application, very little appears to have been done to try to move his application forward. Indeed, Mr. Kandiah's claim that his application simply "languished" for a number of years appears accurate.

[5] Mr. Kandiah made a number of inquiries with respect to the status of his application, contacting the visa office in Colombo on approximately three occasions. He says that each time he called, he was told that his application was being processed and that he would just have to wait. At various points, inquiries with respect to the status of the application were made by Canadian counsel acting on Mr. Kandiah's behalf and by a Canadian Member of Parliament. An access to information request was also filed in August of 2012, seeking information regarding his application.

[6] Mr. Kandiah also made two applications for Temporary Residence Permits to allow him to visit his family in Canada. The first application was made in 2005 and the second in 2011. According to Mr. Kandiah, both applications were refused, based, at least in part, on the belief that he would not leave Canada at the end of his visit.

[7] Focus was finally brought to bear on Mr. Kandiah's application for permanent residence in 2012. The visa officer reviewing the application noted that the information in the file was all "badly out of date". The visa officer also questioned whether Mr. Kandiah was still interested in emigrating to Canada, given that there was no record of any recent contact with Mr. Kandiah with respect to the status of his application.

[8] According to the visa officer's CAIPS notes, the last contact with the consultant acting on Mr. Kandiah's behalf had been in 2007, and the only more recent contact with Mr. Kandiah had been an updating of his contact information in 2009. Given the history of the case, and Mr. Kandiah's "severe lack of any interest", the officer felt it necessary to determine whether Mr. Kandiah was still interested in pursuing his application.

[9] Consequently, a procedural fairness letter was sent to Mr. Kandiah on September 26, 2012. This letter noted that the visa officer had two concerns with respect to the application: the first relating to Mr. Kandiah's admissibility and the second being whether he continued to be interested in migrating to Canada on a permanent basis.

[10] The visa officer indicated in his letter that if Mr. Kandiah wanted to pursue his application, then steps would be taken to deal with the admissibility issue. Alternatively, the officer advised that the application could be withdrawn without an inadmissibility finding, if Mr. Kandiah was no longer interested in coming to Canada. The letter concluded by giving Mr. Kandiah 30 days in which to respond.

[11] When no response was received from Mr. Kandiah within the 30 day period specified in the fairness letter, the visa officer wrote to Mr. Kandiah on November 5, 2012, advising him that his application for permanent residence was being refused under subsections 16(1) and 11(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, on the basis that he had not satisfied the officer that he was not inadmissible to Canada. This is the decision underlying this application for judicial review.

[12] After Mr. Kandiah received this decision, his Canadian counsel wrote to the visa officer asking that the refusal decision be reconsidered. This letter, marked 'Urgent', is dated November 12, 2012, but was not actually sent to the visa post until November 22, 2012.

[13] The basis for the reconsideration request was counsel's claim that a letter had in fact been sent to the visa post on Mr. Kandiah's behalf on October 26, 2012 requesting an additional 30 days in which to respond to the visa officer's concerns. The November 12, 2012 letter further noted that applicants for permanent residence are entitled to a meaningful opportunity to address visa officer's concerns, and asked that Mr. Kandiah be given to the end of November to provide the requested information.

[14] This request was subsequently refused, and the reconsideration decision is not currently before me.

Analysis

[15] As was noted in the introduction to these reasons, Mr. Kandiah has raised issues with respect to both the reasonableness of the visa officer's decision and the fairness of the process followed in arriving at that decision.

[16] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190 and *Canada (Citizenship and Immigration) v Khosa.*, 2009 SCC 12 at para. 59, [2009] 1 S.C.R. 339.

[17] To the extent that the issues raised by Mr. Kandiah go to the fairness of the process that was followed in this case, the task for the Court is to determine whether the process followed by

the decision-maker satisfied the level of fairness required in all of the circumstances: see Canada (*Citizenship and Immigration*) v. *Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 43.

[18] Mr. Kandiah says that the visa officer's finding that he had not shown an ongoing interest in moving to Canada was unreasonable, given the repeated inquiries that had been made with respect to the status of his application, either by him directly or by others acting on his behalf.

[19] Mr. Kandiah also submits that it was perverse for Canadian immigration authorities to refuse his applications for Temporary Residence Permits on the basis that he would not leave Canada at the end of his visit, and then to refuse his application for permanent residence on the basis that he had not demonstrated a continued interest in moving to Canada.

[20] The difficulty with these submissions is that while concern with respect to Mr. Kandiah's ongoing interest in pursuing his application for permanent residence was undoubtedly one of the considerations motivating the sending of the procedural fairness letter, it does not appear to have been a factor in the ultimate decision to refuse Mr. Kandiah's application for permanent residence.

[21] Indeed, the operative portion of the November 5, 2012 decision letter states:

Your documentation is badly out of date. I am lacking the contact that would be necessary to effectively conclude the procedural fairness on eligibility and admissibility issues [sic]. Thus, I cannot and do not have a reasonable understanding of your background. As a result and in accordance with A11, I am not satisfied that you are not inadmissible and that you meet the requirements of the *Act*.

[22] Mr. Kandiah also contends that he was treated unfairly by the visa officer, as he did not respond to the September 26, 2012 procedural fairness letter in a timely fashion.

[23] The respondent has no record of ever having received an October 26, 2012 letter from Mr. Kandiah's counsel, and the burden is on Mr. Kandiah to establish that the letter was in fact sent. However, the evidence provided on behalf of Mr. Kandiah on this point raises more questions than it answers.

[24] Mr. Kandiah has provided an affidavit from a legal assistant in his counsel's office, which asserts that the October 26, 2012 letter was sent to the visa post in Colombo. There is, however, no indication as to when the letter was sent. This is a real concern, given that counsel's November 12, 2012 letter was evidently not sent to the visa post until some 10 days after it was written, despite it being described as an 'Urgent' letter, and no explanation has been provided for this significant delay.

[25] More troubling, however, is the fact that although various documents were appended to the assistant's affidavit, no copy of the October 26, 2012 letter has been provided. The assistant did, however, attach a copy of counsel's November 12, 2012 letter, along with a copy of the fax confirmation sheet demonstrating that the letter had indeed been sent to the visa post.

[26] While counsel suggested that his office had been unable to locate the fax confirmation form for the October 26, 2012 letter, no satisfactory explanation has been provided for the failure to produce the file copy of the letter that is so central to this case.

[27] In these circumstances, I have not been persuaded that there has been a denial of procedural fairness in this matter.

[28] Finally, counsel urges me to have regard to the totality of the circumstances of this case in determining whether Mr. Kandiah has been treated fairly by Canadian immigration authorities. In particular, Mr. Kandiah takes issue with the eight and a half years that it took to render a decision in relation to his application for permanent residence.

[29] As was noted earlier, the delays in processing Mr. Kandiah's application for permanent residence are regrettable, and are not readily explained by reference to the record. That said, this is not an application for mandamus. The question is not whether the decision was made in a timely manner, but whether there was a specific unfairness in the process.

[30] For the reasons given, Mr. Kandiah has not persuaded me that he was treated unfairly in the processing of his application for permanent residence. Consequently, his application for judicial review is dismissed. I agree with the parties that the case does not raise a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed.

“Anne L. Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-634-13

STYLE OF CAUSE: PREMACHANDRAN KANDIAH v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 26, 2014

**REASONS FOR JUDGMENT
AND JUDGMENT:** MACTAVISH J.

DATED: MAY 27, 2014

APPEARANCES:

Robert I. Blanshay

FOR THE APPLICANT

Daniel Engel

FOR THE RESPONDENT

SOLICITORS OF RECORD:

ROBERT ISRAEL BLANSHAY
PROFESSIONAL
CORPORATION-BARRISTERS
& SOLICITORS
CANADIAN IMMIGRATION
LAWYERS
Toronto, Ontario

FOR THE APPLICANT

WILLIAM F. PENTNEY,
DEPUTY ATTORNEY
GENERAL OF CANADA
Toronto, Ontario

FOR THE RESPONDENT