Federal Court  Cour fédérale

Date: 20160105

Docket: IMM-1432-15

Citation: 2016 FC 8

Ottawa, Ontario, January 5, 2016

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

MASARU GENNAI AND MANAMI GENNAI

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicants have applied for judicial review of Exclusion Orders made against them by a Minister's Delegate on March 5, 2015. The application was made pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

[2] The Applicants are Japanese citizens. However, their one year old son is a Canadian citizen. The Applicants lived and worked in London, Ontario but their work permits expired in

2014. On March 4, 2015, they returned to Canada with their son following a trip to Japan. At that time, they were referred to Immigration Secondary for an information gathering examination [the Examination]. As a result of the Examination, the Immigration Officer determined that the Applicants were without status in Canada, and he wrote a report under section 44(1) of the IRPA [the Report]. Thereafter, the Applicants were released on the basis that they were to return on March 5, 2015 at 6:00 p.m. to have the Report reviewed by a Minister's Delegate [the Review].

[3] During the day on March 5th, the Applicants retained a lawyer [Counsel]. They were instructed by him to advise the Minister's Delegate that evening that they had Counsel, and that he wanted to participate in the Review by teleconference and make submissions on their behalf.

[4] When the Applicants arrived for the Review, they were told that the Minister's Delegate was not ready to see them and they were asked to return in one hour. At 7:00 p.m., they returned and the Review was held. Thereafter, the Minister's Delegate made the Exclusion Orders against the Applicants [the Orders].

[5] At no time did the Applicants advise the Minister's Delegate that they had Counsel who wished to participate in the Review by telephone.

[6] The Minister's Delegate first learned of Counsel's existence when, after the Orders were made, she received a message saying that the Applicant's Counsel had called [the Message]. The Message was taken by a person the Minister's Delegate describes as "colleague" so I

presume it was a fellow officer who answered Counsel's telephone call. However, there was no affidavit from that officer and the text of the Message is not in evidence.

[7] An affidavit from a Japanese interpreter who was with Counsel at his office and overheard both sides of the telephone call states that during the telephone call which was made at 7:40 p.m., Counsel said that he was calling to make submissions. He was told that he would receive a return call from the responsible Officer.

[8] The Minister's Delegate completed the Review between 8:00 and 8:30 p.m. and then issued the Orders. Thereafter, she received the Message. She called Counsel back at 8:39 p.m. and advised him that the Orders had been made.

I. The Concessions

[9] Notwithstanding the multitude of issues raised in the Applicant's Memorandum of Argument, Applicants' Counsel indicated that only the issues listed below require determination. He also advised that the Applicants acknowledge that the Orders are reasonable.

II. The Issues

1. Whether the Applicants had a right to Counsel pursuant to section 10(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [the *Charter*]; and

2. Whether the principles of fairness required the Minister's Delegate to advise the Applicants of the possibility of retaining counsel in accordance with Citizenship

and Immigration Manual ENF 6, section 5.7 [the Guideline] and required the Minister's Delegate to hear Counsel's submissions.

A. *Issue 1 – Section 10(b) of the Charter*

[10] In my view, the decision of the Supreme Court of Canada in *Dehghani v Canada (Minister of Citizenship and Immigration)*, [1933] 1 SCR 1053 at paragraphs 39 to 42, is dispositive of this issue. There, the Court said that both primary and secondary immigration inspections on arrival in Canada are not detentions for the purpose of section 10(b) of the *Charter*. However, the Court in *Dehghani* did not expressly consider supplementary secondary examinations such as the Review. Nevertheless, the Respondent argues, and I agree, that there is no logical reason to distinguish the Review from the Examination in this case because the purpose of the Review was simply to confirm the facts gathered during the Examination. Accordingly, the Applicants were not detained and had no right to counsel pursuant to section 10(b) of the *Charter*.

B. *Issue 2 – Fairness*

[11] The Applicants say that, by reason of the Guideline, they had a legitimate expectation that before the Review, they would be advised of the possibility of being represented by counsel during the Review. There is no issue that they were not so advised. Further, they said that the Guidelines mean that Counsel should have been permitted to make submissions by telephone before the Orders were made.

[12] The Guideline reads as follows:

5.7 Counsel	**5.7 Conseil**
Persons do not have a right to counsel at removal order determinations and eligibility determinations, unless they are detained. In all cases, however, persons must be given the opportunity to obtain counsel at their own cost.	Une personne n'a pas droit à un conseil lorsque sont prises les décisions relatives à une mesure de renvoi ou à l'admissibilité, à moins qu'elle ne soit détenue. Dans tous les cas, cependant, l'intéressé doit avoir la possibilité d'obtenir les services d'un conseil, à condition d'en assumer les coûts.
…	…
In released cases: Officers must inform persons of the possibility of retaining counsel prior to commencing the interview. They do not have the right to have counsel present during the interview. However, in the spirit of procedural fairness, officers should permit counsel's presence. At any time during the interview, however, officers may require counsel to leave if they are of the opinion that such an action is warranted.	**Dans les cas de personnes en liberté :** L'agent doit informer l'intéressé qu'il a la possibilité de faire appel à un conseil avant de débuter l'entrevue. L'intéressé n'a pas le droit d'avoir son conseil présent durant l'entrevue. Toutefois, dans un souci d'équité procédurale, la présence du conseil devrait être autorisée par l'agent. Cependant, à tout moment de l'entrevue, si l'agent est d'avis que cela est justifié, il peut demander au conseil de quitter la pièce.
[My emphasis]	[Je soulinge]

[13] The content of the duty of fairness depends on the facts. In my view, it cannot be said that ignoring the Guideline and failing to advise the Applicants of the possibility of retaining counsel was a breach of the duty of fairness in circumstances in which the Applicants had already retained counsel.

[14] Of greater concern, is the fact that, in the telephone call, Counsel said he was "calling to make submissions." Unfortunately, there is a lack of evidence on this issue. I have no explanation from the officer who answered the call about why the Message did not reach the Minister's Delegate until after the Orders were made. In my view, the onus is on the Respondent to explain why the Message did not reach the Minister's Delegate promptly. In the absence of an explanation, I infer that the Guideline was ignored for a second time on the evening of March 5th in that the officer who answered the call did not, in the wording of the Guidelines, take the steps necessary to "permit counsel's presence". In other words, he or she failed to pass the Message to the Minister's Delegate during the Review.

[15] I am mindful that there is no *Charter* right to counsel and that the Guidelines are not binding. Nevertheless, the duty of fairness applies:

i. because the Orders had a significant impact on the Applicants (they could not return to Canada for one year); and

ii. because they could not be appealed; and

iii. because the Guideline recognizes that fairness requires counsel on a review.

[16] In my view, the duty of fairness has been breached. Steps should have been taken by the officer who took the Message to promptly contact the Minister's Delegate so that she could have afforded Counsel the opportunity to make submissions before the Orders were issued. Further, if there was a reason why that could not have occurred, an explanation should have been provided.

[17] The final issue is the question of the appropriate remedy. The Applicants say that they have been prejudiced by their lack of Counsel but no evidence has been adduced from Counsel to show what Counsel's submissions would have been, and how they might have affected the Minister's Delegate's decision on the Review.

[18] I have concluded that, in the absence of any evidence of substantive prejudice and given the Applicant's acknowledgement that the Orders are reasonable, the application will not be allowed.

III. Proposed Question for Certification

[19] The Applicants proposed the following question:

> Is there a detention within the meaning of section 10(b) of the *Charter* when a person is referred to a Minister's Delegate for the purpose of reviewing a report under section 44 of IRPA to determine whether a removal order should be made?

[20] In my view, for the Reasons given above, this issue has been decided by the Supreme Court of Canada in *Dehghani* and therefore, the question is not one of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed;

2. The proposed question is not certified for appeal.

"Sandra J. Simpson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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