Date: 20080213

Docket: IMM-2283-07

Citation: 2008 FC 181

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

UMASANGAR GUNASINGAM

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] One may be a liar and a refugee both. But if one was determined to be a refugee as a result of misrepresenting or withholding material facts, that decision may be set aside. Mr. Gunasingam is a young Tamil from Sri Lanka. In his Personal Information Form he recounted a number of incidents up to December 2000 which caused him to fear persecution at the hands of the Liberation Tigers of Tamil Eelam (LTTE). His parents managed to send him out of his town to another in order to get him out of Sri Lanka. He then recounted a number of events which occurred in Sri Lanka in May and June 2001, which gave him reason to fear the police and the army. He left for the U.S.A.

in June 2001. On arrival there, he was detained for two months. As soon as he was released, he made his way to Canada where he claimed refugee status.

[2] His application was decided on a fast-track basis. The expedited report briefly described the claim in a single paragraph. The member's decision was that "documentary evidence on country conditions in Sri Lanka supports general plausibility of claimant's allegations of persecution. Concur with RCO's observations and recommendation."

[3] Mr. Gunasingam travelled on a false passport. His real passport later came to the attention of the authorities. In June 2006 the Minister applied to have the determination that Mr. Gunasingam was a Convention refugee vacated. The passport indicated, as was subsequently admitted during the hearing, that Mr. Gunasingam had left Sri Lanka in February 2001 for Malaysia where he remained a number of months before continuing on to the United States and Canada.

[4] At the hearing on the application to vacate, Mr. Gunasingam explained that his treatment at the hands of the Sri Lankan authorities and the army actually occurred, but several months earlier. He had written his narrative in his own language, but in translating it into English the translator changed the dates. The translator said it was most important to hide the fact that he was in Malaysia for some months, as that was a fact which would be held against him. Conveniently Mr. Gunasingam did not keep a copy of what he wrote in the first place and he claims the translator did not keep a copy either. Although the translator's name was given, neither Mr. Gunasingam nor the

Minister called him as a witness, which I consider completely inappropriate given that this translator is said to have been a party to fraud.

[5] The member of the Refugee Protection Division of the Immigration and Refugee Board of Canada dismissed the Minister's application to vacate. This is a judicial review of that decision.

THE LAW

[6] Section 109 of the *Immigration and Refugee Protection Act* provides:

109. (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.	**109.** (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.
(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.	(2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	(3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

[7] A decision must be made with respect to subsection 109(1) before consideration is given to subsection 109(2). There are three elements to subsection 109(1): a) there must be a misrepresentation or withholding of material facts; b) those facts must relate to a relevant matter; and c) there must be a causal connection between the misrepresenting or withholding on the one hand and the favourable result on the other.

[8] If, the burden being upon him, the Minister meets the three requirements of subsection 109(1), the member may still reject the application to vacate if satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection. It is important to note that the issue is not whether the member thinks there is sufficient evidence at the hearing on the application to vacate, but rather whether there was other sufficient evidence, which evidence was considered at the first determination.

THE DECISION UNDER REVIEW

[9] The member's analysis and conclusion are short, and do not draw a sharp distinction between the requirements of subsections 109(1) and 109(2). Indeed the reasoning is ambiguous. As I read it, the member concluded that the Minister had not satisfied the requirements of subsection 109(1) of IRPA, but even if he had, there was sufficient untainted evidence under subsection 109(2) to let the original decision stand.

[10] She reviewed the documentary evidence from the original refugee claim which described difficulties experienced by young Tamil men from northern Sri Lanka at that time. She said "simply

on this basis, I believe there is still sufficient evidence to support the determination made by the original panel…"

[11] She pointed out that the facts relating to persecution by the LTTE were not misrepresented. "These events all happened between November 1999 and February 16, 2001."

[12] She also did not believe that Mr. Gunasingam's failure to claim in Malaysia would have changed the decision of the original panel.

ISSUES

[13] A number of issues arise:

a. What is the applicable standard of review?

b. To what extent, if any, may new evidence which favours the applicant be taken into account at a vacation hearing?

c. Were the rules of natural justice satisfied by providing reasons sufficiently clear to permit the unsuccessful party to know why the decision was made?

STANDARD OF REVIEW

[14] If there were no case law on point, I might have leaned to the proposition that the standard of review under both subsections 109(1) and 109(2) is reasonableness *simpliciter*. It has been held, however, in *Sethi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1178, [2005] F.C.J. No. 1434 and *Mansoor v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 420,

[2007] F.C.J. No. 571, that the standard under subsection 109(1) is patent unreasonableness, while under section 109(2) it is reasonableness *simpliciter*. There is no reason why I should depart from the dictates of judicial comity and apply a different standard. It must be borne in mind, however, that issues of natural justice are not subject to the pragmatic and functional approach to judicial review. (*Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539). In other words, the standard of correctness applies.

NEW EVIDENCE

[15] It is clear that the Minister is permitted to advance new evidence. The new evidence serves as the very basis of the application to vacate the original decision. However, in this case, Mr. Gunasingam was given an opportunity to explain and to assert that the events actually occurred, just at a different time. Subsection 109(2) of IRPA provides that the Refugee Protection Division may reject the application of the Minister to vacate "…if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection." This is quite different from the equivalent provision in the former *Immigration Act*, section 69.3(5) which allowed the Refugee Division to reject an application if "… there was other sufficient evidence on which the determination was or could have been based."

[16] It may have been arguable under the former Act, but not under the current Act, that the "corrected" version of events could be considered. However, in *Coomaraswamy v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153, [2002] F.C.J. No. 603, the Federal Court

of Appeal gave short shrift to that argument. Mr. Justice Evans' words are even more telling under the present Act:

> [15] Any possible doubt about the interpretation of subsection 69.3(5) is resolved by asking what legislative purpose would be served by affording to claimants who succeed in deceiving the Board an opportunity to submit additional evidence in an attempt to prove *de novo* at the vacation hearing that their claims were genuine. No such opportunity is available to either truthful or deceptive claimants whose claims for refugee status are dismissed. To allow a claimant who succeeded in deceiving the Board a second bite at the cherry by introducing new evidence at the vacation hearing would reward deception and remove an incentive to tell the truth.

[17] I have no hesitation in holding that Mr. Gunasingam's new dates are simply not relevant. The fact remains that he represented that he was persecuted in Sri Lanka in May and June 2001, when he was actually in Malaysia. Those events cannot be taken into account, irrespective of when they may have taken place.

[18] Whether considered under subsections 109(1) or 109(2), the member was wrong in concluding that country conditions alone justified the granting of refugee status. The claim must be personalized (*Taj v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 707, [2004] F.C.J. No. 880, *Canada (Minister of Citizenship and Immigration) v. Fouodji*, 2005 FC 1327, [2005] F.C.J. No. 1614 and *Coomaraswamy*, above.

[19] Furthermore, it was outright conjecture, and not inference, which led the member to conclude that the original panel would not have taken into account the fact that Mr. Gunasingam did not claim refugee status in Malaysia. The original panel could not have taken that fact into

consideration because it did not know he was there for several months. It is patently unreasonable to base a decision on conjecture and speculation (*Canada (Minister of Employment and Immigration) v. Satiacum*, [1989] F.C.J. No. 505, 99 N.R. 171).

[20] Turning to the events untainted by the misrepresentation, i.e. section 109(2), the member states that allegations of persecution by the LTTE were not misrepresented and they all happened between November 1999 and February 16, 2001. That is not correct. They must have occurred, if they occurred at all, by December 2000. The subsequent events which were moved up from May and June 2001 to dates before February 16, 2001 allegedly gave Mr. Gunasingam fear of persecution at the hands of the authorities and the army, not the LTTE. If we discount those events, which we must, because we must discount his explanation, then at the very least it would have been open to the first panel to consider the internal flight alternative.

INADEQUATE REASONS AND NATURAL JUSTICE

[21] Although a criminal case, *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, has been frequently cited in the administrative law context. An application to vacate a decision granting refugee status is most important. A party should not be left in any doubt as to why the original decision was or was not vacated. The reasons in this case were not stated clearly and do not readily appear from the record.

[22] As noted in *Sheppard*, above, the Supreme Court had earlier held in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, that in certain

circumstances the duty of procedural fairness in administrative law will require a written explanation for a decision. That requirement applies to section 109 of IRPA (*Canada (Minister of Citizenship and Immigration) v. Shpigelman*, 2003 FC 1209, [2003] F.C.J. No. 1533, *Mansoor*, supra, paragraph 32).

[23] For these reasons, the Minister's application for judicial review shall be granted, and the matter referred back to another panel for a fresh determination. Mr. Gunasingam shall have until 20 February 2008 to suggest a serious question of general importance, and the Minister shall have until 26 February 2008 to reply.

[24] It is simply wrong to think one can gain entry to Canada on the strength of a lie.

"Sean J. Harrington"
Judge

Ottawa, Ontario
February 13, 2008

FEDERAL COURT

SOLICITORS OF RECORD

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