Date: 20090204

Docket: IMM-4749-07

Citation: 2009 FC 119

OTTAWA, ONTARIO, FEBRUARY 4, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

RAVEENDRAN RAJADURAI

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

REASONS FOR ORDER AND ORDER

[1] The applicant is a 45-year-old Tamil from Jaffna, Sri Lanka. He is married and has two 12-year-old twin boys. His wife and children claimed refugee status in Canada in October of 1999, and their claims were accepted on June 7th, 2000. They subsequently applied for landing from within Canada, and the applicant was included in his wife's application for simultaneous processing through the Canadian Visa Post in Colombo, Sri Lanka. The applicant's wife and children were landed in Canada in April of 2004, and they became Canadian citizens in February 2007. As for the applicant, he was interviewed at the Canadian High Commission in Colombo on three separate occasions during the processing of his application. He was ultimately found to be inadmissible to

Canada on security grounds by visa Officer Robert Stevenson on July 24, 2007. It is of that decision that Mr. Rajadurai is now seeking judicial review.

[2] Prior to the hearing of the judicial review application, the Minister of Citizenship and Immigration (the "Minister") applied under s. 87 of *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "IRPA") for the non-disclosure of information considered and relied upon by the officer in making his determination. This information was redacted from the Certified Tribunal Record ("CTR"). The *ex parte* and *in camera* hearing of that motion was held on August 26, 2008; counsel for the applicant and for the Minister were then invited to make submissions on the motion by way of teleconference, which took place on September 11, 2008. Having heard all these oral submissions and considered the records of the parties, I ordered on September 15, 2008 that the application of the respondent be granted and that the information redacted from the Certified Tribunal Record not be disclosed to the applicant and the public. The following reasons deal with both the Minister's application for non-disclosure and with the merits of Mr. Rajadurai's application for judicial review.

BACKGROUND

[3] As previously mentioned, the applicant was interviewed three times during the processing of his application. The first such interview took place in June 2002. The Computer Assisted Immigration Processing System ("CAIPS") notes reveal that the officer had some concerns with his story and his various identity cards. He said that he worked for the Liberation Tigers of Tamil Eelam ("LTTE") under duress, which made him suspicious in the eyes of the army. He claimed to

have been arrested and badly beaten by the army in 1999, and that his father-in-law paid a bribe to secure his release. The officer also doubted the paternity of the couple's twin boys, and asked for DNA tests; these tests eventually established that Mr. Rajadurai was the twins' biological father.

[4] The applicant was interviewed a second time on November 7, 2008. Notes of this interview were not entered into CAIPS, and were therefore inaccessible both to the applicant and to the visa officer who declared him inadmissible. In his affidavit filed in support of the respondent's submissions, visa officer Robert Stevenson declared that the notes taken during the course of that interview were never disclosed to him and, consequently, were not relied upon in rendering his decision.

[5] On February 14, 2007, visa officer Robert Stevenson received materials which raised concerns that the applicant may be inadmissible pursuant to s. 34(1) of *IRPA*. After reviewing this material and the contents of the applicant's file, he decided the applicant should be interviewed further. A third interview was held on June 5, 2007.

[6] The officer questioned the applicant extensively on his business relationship with the LTTE, what he would sell to them, how often, whether he was paid, where he would deliver the food, etc. In his affidavit, the officer testified that his first concern was that the applicant was conducting business with a terrorist organization from 1994 to 1999, in a manner contrary to the usual forced approach of the LTTE. The applicant was also asked about the other tasks he was asked to perform for the LTTE. He mentioned digging bunkers, doing sentry duty, hanging posters, etc. The

applicant claimed that he received no training from the LTTE, and that every villager was occasionally asked to perform such duties for the LTTE. When pushed for details, the applicant was apparently evasive, giving the impression that he wanted to avoid discussing his interactions with the LTTE further. At one point, the officer expressed his scepticism that he would not be solicited by the LTTE to provide information about activities he observed in the town, considering that he was regularly delivering food and doing sentry duty for the LTTE. The applicant responded that the LTTE had an "intelligence unit" which did such information collecting.

[7] According to the CAIPS notes, the visa officer advised the applicant at the end of the interview that he was not convinced he had been completely forthright with him. The visa officer also told the applicant that the work he did for the LTTE and the business he conducted with them raised concerns. The visa officer commented that it appeared the applicant was not really under any duress when he helped the LTTE and did business with them, and that these factors could end up rendering the applicant inadmissible. In response, the applicant could have pleaded with the officer to help him as life is difficult in Colombo, but he did not take this opportunity.

THE IMPUGNED DECISION

[8] The visa officer came to the conclusion that there were reasonable grounds to believe the applicant was a member of the inadmissible class of persons described in s. 34(1)(f) of the *IRPA*. That subsection reads as follows:

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

security grounds for:	suivants :
(*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] The officer was satisfied that the applicant had provided the LTTE with the necessary support to pursue its activities, and that he willingly engaged in conducting business with that terrorist organization. In the CAIPS notes, he elaborated further on his finding:

> Having further reviewed the file and interview notes, I am not at all satisfied that the applicant has been straight forward with me. His explanations frequently lack credibility and there was definite evasiveness with answers (ex. Not remembering more as his mind was on business). Of most concern, however, is that the applicant was clearly and knowingly supplying the LTTE with food stuffs as a commercial venture. I am satisfied that the applicant was clearly aware of the nature of the armed struggle which the LTTE pursues, and he chose to enter into business with the LTTE regardless. Throughout the interview the applicant did not indicate he was supplying food stuffs under duress. Rather, I am satisfied that the applicant saw a business opportunity and willingly engaged it regardless of the fact that the client was the LTTE. In conducting business with the organization, the applicant provided necessary sustenance to the organization which enabled them to continue activities and further their cause. As noted above, credibility was an issue with the PA. I further find it lacking credibility that the LTTE would assign sentry duty to any person off the street as the applicant suggests. Rather, I believe it reasonable to assume that such responsibility would only be given to a person of trust associated with the organization.

> That the applicant was aware and casually offered that the LTTE has an intelligence wing which deals with reconnaissance of the town demonstrates a deeper knowledge of the LTTE structure than I would expect to observe in applicant who is a simple businessman with no ties to the LTTE.
>
> In all, I am satisfied that the definition of membership extends to include the applicant's willing business activities with the LTTE, which provided the organization with necessary assistance for their effective functioning, as well as other assistance he provided like sentry duty. I believe the above provides reasonable grounds to believe that the applicant meets the criteria for a determination of inadmissibility under A34(1)(F). I consequently find the applicant inadmissible to Canada. Application refused.

THE SECTION 87 APPLICATION

[10] Section 87 is found in Division 9 (ss. 76 to 87.1) of *IRPA* and provides a means by which the confidentiality of national security issues in immigration matters can be ensured. It reads as follows:

Application for non-disclosure — judicial review	Interdiction de divulgation — contrôle judiciaire
87. The Minister may, during a judicial review, apply for the non-disclosure of information or other evidence. Section 83 — other than the obligations to appoint a special advocate and to provide a summary — applies to the proceeding with any necessary modifications.	**87.** Le ministre peut, dans le cadre d'un contrôle judiciaire, demander l'interdiction de la divulgation de renseignements et autres éléments de preuve. L'article 83 s'applique à l'instance, avec les adaptations nécessaires, sauf quant à l'obligation de nommer un avocat spécial et de fournir un résumé.

[11] The information referred to in that section is defined in s. 76 of the Act in the following way :

“information" means security or criminal intelligence information and information that is obtained in confidence from a source in Canada, the government of a foreign state, an international organization of states or an institution of such a government or international organization.	«renseignements » Les renseignements en matière de sécurité ou de criminalité et ceux obtenus, sous le sceau du secret, de source canadienne ou du gouvernement d’un État étranger, d’une organisation internationale mise sur pied par des États ou de l’un de leurs organismes.

[12] As for the procedure to be followed, it is set out in s. 83 of *IRPA*, with the caveat that subparagraphs 83(1)(b) and (e) are not mandatory in the context of an application for non-disclosure pursuant to s. 87:

Protection of information	Protection des renseignements
83. (1) The following provisions apply to proceedings under any of sections 78 and 82 to 82.2:	**83.** (1) Les règles ci-après s’appliquent aux instances visées aux articles 78 et 82 à 82.2 :
(*a*) the judge shall proceed as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit;	*a*) le juge procède, dans la mesure où les circonstances et les considérations d’équité et de justice naturelle le permettent, sans formalisme et selon la procédure expéditive;
(*b*) the judge shall appoint a person from the list	*b*) il nomme, parmi les

referred to in subsection 85(1) to act as a special advocate in the proceeding after hearing representations from the permanent resident or foreign national and the Minister and after giving particular consideration and weight to the preferences of the permanent resident or foreign national;

(*c*) at any time during a proceeding, the judge may, on the judge's own motion — and shall, on each request of the Minister — hear information or other evidence in the absence of the public and of the permanent resident or foreign national and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;

(*d*) the judge shall ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;

(*e*) throughout the proceeding, the judge shall

personnes figurant sur la liste dressée au titre du paragraphe 85(1), celle qui agira à titre d'avocat spécial dans le cadre de l'instance, après avoir entendu l'intéressé et le ministre et accordé une attention et une importance particulières aux préférences de l'intéressé;

c) il peut d'office tenir une audience à huis clos et en l'absence de l'intéressé et de son conseil — et doit le faire à chaque demande du ministre — si la divulgation des renseignements ou autres éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

d) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

e) il veille tout au long de l'instance à ce que soit fourni à l'intéressé un résumé de la preuve qui ne comporte aucun élément dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à

ensure that the permanent resident or foreign national is provided with a summary of information and other evidence that enables them to be reasonably informed of the case made by the Minister in the proceeding but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;

(*f*) the judge shall ensure the confidentiality of all information or other evidence that is withdrawn by the Minister;

(*g*) the judge shall provide the permanent resident or foreign national and the Minister with an opportunity to be heard;

(*h*) the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence;

(*i*) the judge may base a decision on information or other evidence even if a summary of that information or other evidence is not provided to the permanent resident or

la sécurité d'autrui et qui permet à l'intéressé d'être suffisamment informé de la thèse du ministre à l'égard de l'instance en cause;

f) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que le ministre retire de l'instance;

g) il donne à l'intéressé et au ministre la possibilité d'être entendus;

h) il peut recevoir et admettre en preuve tout élément — même inadmissible en justice — qu'il estime digne de foi et utile et peut fonder sa décision sur celui-ci;

i) il peut fonder sa décision sur des renseignements et autres éléments de preuve même si un résumé de ces derniers n'est pas fourni à l'intéressé;

j) il ne peut fonder sa décision sur les renseignements et autres éléments de preuve que lui fournit le ministre et les remet à celui-ci s'il décide qu'ils ne sont pas pertinents ou si le ministre les retire.

> foreign national; and
>
> (*j*) the judge shall not base a decision on information or other evidence provided by the Minister, and shall return it to the Minister, if the judge determines that it is not relevant or if the Minister withdraws it.

[13] By Order of this Court dated April 23, 2008; the CTR was due to be filed with the Court on or before May 14, 2008. The Minister applied for the non-disclosure of information, which was redacted from the CTR, and also requested that the Court hear information or other evidence in support of this application in the absence of the public and of the applicant and his counsel on May 21, 2008. The information redacted consists of portions of pages 113, 114 and 116 of the CTR. In support of that application, the Minister filed on the public record the motion for non-disclosure of that information, along with a supporting affidavit confirming that the CTR contains both un-redacted and redacted information, that the ground for the application for non-disclosure is that disclosure of the confidential information would be injurious to national security or endanger the safety of any persons, and that the respondent intends to rely on the confidential information for the purpose of responding to the applicant's application for judicial review. This affidavit also adds that the application for non-disclosure will be supported by one secret affidavit, which will contain the confidential information the respondent seeks to protect.

[14] On June 6, 2008, the Chief Justice ordered that the hearing of the judicial review application be re-scheduled to October 28, 2008, to allow for the *in camera* and *ex parte* hearing of the s. 87

application to take place beforehand, on August 26, 2008. Counsel for the applicant confirmed on June 3, 2008 that he would not seek to be heard at a public hearing on the s.87 application, but he sent written representations. Eventually, a teleconference took place on September 11, 2008 at which counsel for both parties presented arguments on the basis of the public record.

[15] The right to know the case to be met is not absolute. The Supreme Court of Canada has repeatedly recognized that national security considerations can sometimes limit the extent of disclosure of information to an individual: see *Charkaoui* v. *Canada (Citizenship and Immigration)*, 2007 SCC 9, at para. 58l; *Chiarelli* v. *Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 744; *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at para. 122; *Ruby* v. *Canada (Solicitor General)*, [2002] 4 S.C.R. 3, at paras. 38-44.

[16] The state has a considerable interest in protecting national security and the security of its intelligence services. Disclosure of confidential information related to national security or which would endanger the safety of any person could cause damage to the operations of investigative agencies. In the hands of an informed reader, seemingly unrelated pieces of information, which may not in themselves be particularly sensitive, can be used to develop a more comprehensive picture when compared with information already known by the recipient or available from another source. In the past, this Court has consistently relied on the principles articulated in *Henrie* v. *Canada (Security Intelligence Review Committee)*, [1989] 2 F.C. 229 (F.C.T.D.), aff'd (1992), 88 D.L.R.(4th) 575 (F.C.A.). At pages 578 and 579, Mr. Justice Addy wrote:

> […] in security matters, there is a requirement to not only protect the identity of human sources of

information but to recognize that the following types of information might require to be protected with due regard of course to the administration of justice and more particularly to the openness of its proceedings: information pertaining to the identity of targets of the surveillance whether they be individuals or groups, the technical means and sources of surveillance, the methods of operation of the service, the identity of certain members of the service itself, the telecommunications and cipher systems and, at times, the very fact that a surveillance is being or is not being carried out. This means for instance that evidence, which of itself might not be of any particular use in actually identifying the threat, might nevertheless require to be protected if the mere divulging of the fact that C.S.I.S. is in possession of it would alert the targeted organization to the fact that it is in fact subject to electronic surveillance or to a wiretap or to a leak from some human source within the organization.

It is of some importance to realize than an "informed reader", that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and of the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture which he has before him, be in a position to arrive at some damaging deductions regarding the investigation of a particular threat or of many other threats to national security. He might, for instance, be in a position to determine one or more of the following: (1) the duration, scope intensity and degree of success or of lack of success of an investigation; (2) the investigative techniques of the Service; (3) the typographic and teleprinter systems employed by C.S.I.S.; (4) internal security procedures; (5) the nature and content of other classified documents; (6)

> the identities of service personnel or of other persons involved in an investigation.

[17] In light of the submissions made by counsel for the respondent, of the testimony of the affiant who swore the private affidavit, and of the documents that were filed on the public record and confidentially, I am satisfied that the disclosure of the redacted information contained in pages 113, 114 and 116 of the CTR would be injurious to national security or safety. Following the recommendations of my colleague Mme Justice Dawson in *Ugbazghi* v. *The Minister of Citizenship and Immigration*, 2008 FC 694, the secret affidavit was not a mere assertion of conclusions, but detailed the evidence and the reasoning as to why, in the opinion of the deponent, each redaction was necessary in order to protect national security or the safety of any person.

[18] In his written and oral submissions conveyed through teleconference, counsel for the applicant argued that the non-disclosure application should be dismissed because the redacted portions of the CRT would seriously prejudice the applicant's ability to know and comprehend the case that he had to meet in Court. While acknowledging that the *Canadian Charter of Rights and Freedoms* does not apply to the applicant since he is not living on Canadian soil, counsel nevertheless argued that the Supreme Court's decision in *Charkaoui* v. *Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9 demonstrates the seriousness of the procedural unfairness that results from the operation of the special security provisions of the *IRPA*.

[19] A similar argument was addressed by Mr. Justice Blais (now on the Court of Appeal) in *Segasayo* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 372. In

that case, the applicant was in Canada and had been declared inadmissible after having been granted refugee status. The non-disclosure application had been made in the context of an application for judicial review challenging the decision by the Minister to deny the applicant's request for an exemption pursuant to s. 35(2) of *IRPA*. Mr. Justice Blais distinguished the *Charkaoui* decision on two grounds: first, the applicant was not detained and his liberty interest was therefore not at stake, contrary to the person subject to a security certificate while awaiting a decision on his or her inadmissibility. Indeed, even the applicant's security interest was not immediately at stake, since he could not be deported pursuant to ss. 115(2)(b) of the Act barring a determination by the Minister that he "should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada". Second, Mr. Justice Blais was of the view that the information sought to be kept secret in the context of a security certificate was much more extensive than was the case under s. 87, where an applicant is able to determine the exact amount of information that is being excluded by looking at the redacted CTR.

[20] These considerations apply with even more force to the case at bar. Here, the applicant does not even live in Canada, and as a consequence his liberty and security interests cannot be threatened by the limiting of the disclosure of information. Moreover, it is clear from the CTR that only a very small portion has been redacted; as a result, he is aware of the vast majority of the information upon which the visa officer relied. Having read the redacted portions of the CTR, I am not of the view that considerations of fairness and natural justice required the appointment of a special advocate to protect the interests of the applicant; indeed, counsel for the applicant did not request such a measure.

[21] Consequently, I determined that the information redacted from the Certified Tribunal Record and contained in the secret affidavit attachments thereto shall not be disclosed to the applicant, to his counsel or to any member of the public. I also determined that the non-disclosed information may be relied on by the Minister and the Court in the determination of the judicial review application.

THE APPLICATION FOR JUDICIAL REVIEW

[22] Counsel for the applicant raises three issues in his oral and written submissions. First, he submits that the failure to record the details of the applicant's November 7, 2006 interview before the visa officer constitutes a breach of natural justice. Second, he argues that the information in the possession of visa officer Stevenson on or about February 14, 2006 that led him to have concerns regarding the applicant's admissibility on security grounds constitute extrinsic evidence which procedural fairness demands be disclosed to the applicant. Third, he contends that Officer Stevenson committed an evidentiary error by failing to have regard to the applicant's statements to the visa officer in June 2002 which indicated that any work that he did for the LTTE was done under threat and not voluntarily.

[23] Given the highly factual nature of the questions pertaining to the credibility of the applicant and to the assessment of the evidence, the applicable standard of review is clearly that of reasonableness. These are exactly the kinds of issues that come within the expertise of the visa officers, and their conclusions in that respect are entitled to a high degree of deference. On the other hand, the first and second issues raised by the applicant clearly relate to procedural fairness. These

issues are not subject to a standard of review analysis, and must be assessed against a standard of correctness.

[24] As a matter of policy, visa officers are directed to create and maintain detailed notes of all applicant interviews. This is stated quite clearly in the Overseas Processing Manual OP1 put out by the respondent (A.R., pp. 44-45). However, the fact that a visa officer deviated from this policy by failing to record the details of one of the applicant's interviews does not necessarily translate into a breach of procedural fairness. At the end of the day, what matters is that the applicant be made aware of the reasons as to why he was found inadmissible, so that he can address the visa officer's concerns.

[25] The applicant cannot claim that, without access to the notes of the second interview, his ability to challenge the ultimate decision that he worked voluntarily for the LTTE was prejudiced. First of all, he knew both the questions put to him by the officer during the interview, and his replies. He could even have filed an affidavit recounting his recollection of that interview. Moreover, the visa officer testified that he did not and, in fact, could not rely on the notes from the second interview. Therefore, these notes played no part in the final decision.

[26] As for the information that prompted the visa officer to interview the applicant a third time, it cannot be equated with extrinsic evidence. The decision of the Federal Court of Appeal in *Muliadi* v. *Canada (Minister of Employment and Immigration)*, [1986] 2 F.C. 205, upon which the applicant relies, is distinguishable on its facts. In that case, the visa officer denied the application

for permanent residence as “entrepreneur” on the basis of a provincial government’s negative assessment of his business proposal. The Court made it clear that the reception of this assessment by the visa officer was not problematic in and of itself; it was the failure to inform the applicant of that negative assessment and to give him a fair opportunity to correct or contradict it before making the decision that was erroneous.

[27] Here, the visa officer did not come to his decision on the basis of the information he received. Instead, he conducted a further interview with the applicant wherein the applicant had the opportunity to address the visa officer’s concerns. It is clear from the visa officer’s notes that he conveyed his concerns to the applicant. His questions were clearly focused on the nature of his business relationship with the LTTE, on the extent of his cooperation with that organization, and on the willingness of his participation. It is abundantly clear from the CAIPS notes of this last interview that the officer had some doubts with respect to the applicant’s claim that he helped the LTTE under duress. The applicant cannot credibly claim that he was taken by surprise and had no opportunity to refute these concerns.

[28] Finally, I do not think it can seriously be argued that the visa officer failed to have regard to the applicant’s previous statements. There is a presumption that a decision maker has considered all of the evidence before him when he rendered his decision: see *Florea* v. *Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.). The officer states, in the CAIPS notes dated June 20, 2006, that he had reviewed the file and interview notes before coming to his

decision (A.R., p. 15). It seems to me what the applicant is really taking issue with is how the visa officer chose to interpret the applicant's answers at the last interview. On the basis of the record before the Court, it cannot be said that the visa officer's analysis is unreasonable; quite to the contrary, it is consistent with the concerns arising from the interviews, and which the applicant was unable to dispel.

[29] For all the foregoing reasons, the application for judicial review is dismissed. No question for certification was proposed, and none will be certified.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed. No question is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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