Federal Court  Cour fédérale

Date: 20090528

Docket: IMM-2188-08

Citation: 2009 FC 557

Ottawa, Ontario, May 28, 2009

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

MOHAMED FAZLATH MOHAMED NIZAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Mohamed Fazlath Mohamed Nizar (the "Applicant") seeks judicial review of the rejection of his Pre-Removal Risk Assessment application ("PRRA application") by Officer Mazzotti (the "Officer").

[2] The Applicant is a citizen of Sri Lanka who came to Canada in November 2000. He claimed to be a Sri Lankan Moor and a businessman with ties to the Sri Lankan Tamil community in Northern Sri Lanka. He alleged that he was targeted by police, saying that they suspected him of having ties with the Tamil movement.

[3] The Applicant's claim for refugee protection was refused on January 7, 2002. His application for leave and judicial review of that decision was dismissed on May 16, 2002.

[4] The Applicant made his PRRA application on January 13, 2002. His counsel, at that time, provided submissions about threats and beatings by the police, due to his alleged involvement with the Liberation Tigers of Tamil Eelam ("LTTE").

[5] The file that the Applicant's present counsel obtained from his former counsel showed that further PRRA submissions were drafted on November 15, 2007. However, the Officer's decision showed that no further submissions were filed.

[6] The Applicant's PRRA application was denied on March 19, 2008. According to the affidavit that he filed in support of this application for leave and judicial review, the Applicant contacted his former counsel who advised him to seek judicial review. He deposes that he instructed his former lawyer to take the necessary steps in that regard and she said that she could do so.

[7] In May 2008, the Applicant received a telephone call telling him he should report for removal. After this telephone call, he visited the office of his former counsel to find out the status of his application for judicial review and was advised that she "would take care" of both the judicial review and the removal order. The Applicant then decided to retain new legal representation.

[8] In his affidavit filed in the present proceeding, the Applicant deposes that his former counsel is now subject to disciplinary proceedings before the Law Society of Upper Canada arising from her failure to respond to numerous complaints from the Complaints Resolution Department of the Law Society. He has decided to file a complaint against his former counsel.

[9] In this application for judicial review, the Applicant argues that in concluding that he was not at risk of persecution in Sri Lanka pursuant to section 96 or that there were substantial grounds to believe that he would face a risk of torture, risk to life or risk of cruel and unusual punishment pursuant to subsection 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), respectively, the Officer committed a reviewable error by misconstruing the evidence or by drawing unreasonable inferences. The Applicant also argues that a breach of natural justice occurred because he had been represented by incompetent counsel.

[10] The Minister of Citizenship and Immigration (the "Respondent") submits that the Officer did not ignore or misconstrue the evidence, including the documentary sources that she consulted. He argues that the decision is reasonable, having regard to the evidence that was before her. Further,

he notes that the Officer considered the evidence that the Applicant's family continued to live in Sri Lanka without problems caused by the alleged agents of persecution.

[11] As for the submissions concerning a breach of procedural fairness arising from the alleged incompetence of the Applicant's former counsel, the Respondent argues that the Applicant has failed to meet his onus in this regard. The Respondent submits that the Applicant has failed to show that his former counsel's behaviour amounts to professional misconduct but in any event, he has failed to show that he was prejudiced by the alleged misconduct and that a miscarriage of justice occurred in that, except for the alleged misconduct, the result of the Officer would have been different.

[12] The first matter to be addressed is the applicable standard of review. Further to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, fact-driven decisions of administrative decision-makers are reviewable on the standard of reasonableness. Where prior jurisprudence has established the applicable standard of review, a reviewing court need not engage in an exhaustive review in order to identify the applicable standard of review; see *Dunsmuir* at para. 57, as discussed and applied in *Da Mota*. Having regard to the body of jurisprudence that has been developed with respect to judicial review of PRRA decisions, I adopt the standard of reasonableness in this case.

[13] The issue of procedural fairness remains subject to review on the standard of correctness; see *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221 at para. 65.

[14] Turning to the issue of the Officer's alleged failure to properly consider the evidence of persecution or risk to the Applicant, this is essentially a question of fact. The Officer is mandated to weigh the evidence submitted.

[15] Insofar as his challenge to the factual findings of the Officer is concerned, the Applicant argues that the Officer ignored or misconstrued or drew improper inferences relative to his status as a young Tamil male who has attracted the interest of the police, in the past. He also submits that she ignored the fact that he is a businessman and that Tamil businessmen were specifically targeted in Colombo. Further, he argues that in light of the findings about the use of torture by the police and the dire human rights situation, the conclusion that he would not face persecution is unreasonable.

[16] The record before the Officer does not support these arguments. The Officer clearly set out the basis for doubting that the Applicant was of interest to the police. Her conclusion is reasonable.

[17] I agree with the submission of the Respondent that the Officer committed no error in reaching her conclusion as to the Applicant's status. He identified himself in his PRRA submission as a Sri Lankan Moor and businessman with ties to the Tamil community. This description is not the same as a "young Tamil" and in my opinion, it was not unreasonable for the Officer not to describe him as such, especially when the Applicant himself did not use that description.

[18] The Officer made a reasonable finding relating to the Applicant's status as a businessman since there was no evidence to show that he continued to operate a business or would be compelled to do so if he returned to Sri Lanka.

[19] While there is evidence that young Tamil males were subject to human rights violations by the government, in the absence of evidence that the Applicant fit this profile, it was reasonable for the Officer not to apply that evidence to the PRRA application that was before her.

[20] In summary, the Officer's conclusions upon the evidence were reasonably open to her and no reviewable error has been shown.

[21] I turn now to the Applicant's submissions concerning breach of procedural fairness arising from the incompetence of his former counsel. This issue is reviewable on the standard of correctness, as noted above.

[22] The bar for demonstrating that incompetence of counsel has given rise to a breach of procedural fairness is high. The subject was discussed by Mr. Justice Denault in *Shirwa v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 51, who said the following at para. 12:

> 12 In other circumstances where a hearing does occur, the decision can only be reviewed in "extraordinary circumstances", where there is sufficient evidence to establish the "exact dimensions of the problem" and where the review is based on a "precise factual foundation." These latter limitations are necessary, in my opinion, to heed the concerns expressed by Justices MacGuigan and Rothstein that general dissatisfaction with the quality of representation freely chosen by the applicant should not provide

> grounds for judicial review of a negative decision. However, where the incompetence or negligence of the applicant's representative is sufficiently specific and clearly supported by the evidence such negligence or incompetence is inherently prejudicial to the applicant and will warrant overturning the decision, notwithstanding the lack of bad faith or absence of a failure to do anything on the part of the tribunal.
> [Emphasis added]

[23] The Respondent argues that in order to succeed on this argument, the Applicant must establish three elements as follows:

a. that Counsel's acts or omissions constituted incompetence;

b. that he was prejudiced by the alleged misconduct; and

c. that there was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result from the original hearing would have been different.

In this regard, the Respondent relies on the decisions in *Yang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 269; *R. v. G.D.B.*, [2000] 1 S.C.R. 520; *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 646, and others.

[24] In *Huynh v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 18, the Court held that only in the most extraordinary situations will the Court conclude that the conduct of counsel justifies intervention in a decision reached in a judicial review proceeding.

[25] In my opinion, that is not the case here. Leaving aside the nature of the conduct of the former counsel in failing to file further submissions in support of the Applicant's PRRA application, he has failed to establish the second and third elements set out above.

[26] The Applicant had a "hearing" before the PRRA Officer. There was no prejudice to him in that regard. More importantly, he has failed to show that the outcome would have been different. The Officer had the original submissions and she looked at updated documentation concerning country conditions.

[27] I am satisfied that no breach of natural justice has occurred here, as a result of the actions of the Applicant's former Counsel and this application for judicial review will be dismissed. There is no question for certification arising.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed, no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	MOHAMED FAZLATH MOHAMED NIZAR v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, ON
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