

Federal Court



Cour fédérale

Date: 20091204

Docket: IMM-2178-09

Citation: 2009 FC 1236

Ottawa, Ontario, December 4, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

MAHENDRAN, Indrakumar

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of the decision of a Pre-Removal Risk Assessment Officer (the Officer) refusing to grant permanent residence from within Canada on humanitarian and compassionate grounds to Indrakumar Mahendran (the Applicant).

Factual Background

[2] The Applicant is a 32 year old citizen of Sri Lanka. He is of Tamil ethnicity and originates from northern Sri Lanka. He fled Sri Lanka in 2001, arriving in France where he lived until his asylum claim was rejected. He came to Canada in November 2004 and sought asylum. His claim for refugee protection was denied on November 15, 2006 on the basis of credibility issues and his application for judicial review of that decision was denied.

[3] In February 2008, the Applicant applied for a pre-removal risk assessment (PRRA); a negative decision was rendered on March 17, 2008. He also applied for permanent residence from within Canada on humanitarian and compassionate grounds (H&C). The same officer rendered both decisions. That H&C was refused on March 18, 2008 and is now the subject of this judicial review.

Impugned Decision

[4] The Officer's written reasons begin by identifying the purpose of the H&C grounds application. She notes that they are based on an allegation of risk to the Applicant should he be returned to Sri Lanka and his degree of establishment in Canada. She continues by stating that she was the Officer who assessed the Applicant's PRRA application. Also, she specifies that when risk is assessed in the context of an H&C application, it is done in the context of the degree of hardship and not the same threshold as a PRRA.

[5] The Officer writes that the determinative issue in the Applicant's refugee claim was his credibility and the RPD detailed these credibility concerns in its reasons. She then reproduces some

of the credibility issues detailed by the RPD in its written reasons. These include negative inferences based on the Applicant's failure to establish his residency for the five-year period before he left Sri Lanka, the failure to provide documentation from the French refugee claim at the time of hearing and inconsistencies between the two claims. She also writes that although she is not bound by the RPD findings, she does give considerable weight to them.

[6] The Officer then undertakes the analysis of the grounds at the basis of the application. On the issue of the deteriorating conditions in Sri Lanka, she indicates that she has read and considered the information submitted by the Applicant including news articles and other sources quoted in his narrative. She goes on to review the documentary evidence on country conditions in Sri Lanka. She reproduces sections of both the 2008 U.S. Department of State Country Reports on Human Rights Practices for Sri Lanka and the 2006 UNHCR position on the international protection needs of asylum seekers from Sri Lanka commenting on the situation of Tamil people on Sri Lanka. She then writes that she acknowledges the changing circumstances in Sri Lanka but that recent events have brought almost the entire country under government control; she references a BBC News country profile in a footnote to her conclusion. She finally concludes that there is no objective evidence that the government of Sri Lanka denies core human rights to its Tamil citizens nor that the Applicant is at risk from the government, army, the Liberation Tigers of Eelam (LTTE) or any other group. The Officer then finds that the Applicant is a male Tamil from the north of Sri Lanka however, based on the documentary evidence, she cannot find that a return to Sri Lanka would not be an unusual and undeserved or disproportionate hardship.

[7] The Officer reviews various employment documents provided and finds that, although the Applicant has made efforts to become established, she is not satisfied that he expected to be allowed to remain in Canada permanently. She states that it is commendable that the Applicant has achieved some level of establishment but that she does not give significant weight to the Applicant's length of time or establishment in Canada and severing those ties would not constitute an unusual and undeserved or disproportionate hardship.

[8] Finally, the Officer finds that overall, the Applicant has not demonstrated that his personal circumstances are such that having to apply for a permanent resident visa from outside of Canada would be an unusual and undeserved or disproportionate hardship. She acknowledges that the Applicant may face difficulties re-adapting to life in Sri Lanka but this is not an unusual and undeserved or disproportionate hardship.

Issues

[9] Although the Applicant has raised numerous questions, only one suffice to dispose of this application: did the Officer breach the duty of fairness by failing to disclose her intention to rely on changing circumstances in Sri Lanka and documentary evidence relating thereto?

[10] The application for judicial review shall be allowed for the following reasons.

Relevant Legislation

[11] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

Analysis

Standard of review

[12] The standard of review of an H&C decision, given its discretionary nature and its factual intensity, is held to the deferential standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 51 and 53; *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 646, [2008] F.C.J. No. 814 at paragraph 11 (QL)). Accordingly, the Court is concerned with the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within the range of acceptable outcomes that are defensible in fact and in law (*Dunsmuir*, at paragraph 47). As for a

breach of fairness, it is held to a correctness standard and no deference is granted to the decision maker (*Ahmad*, at paragraph 14).

Did the Officer breach the duty of fairness by failing to disclose her intention to rely on changing circumstances in Sri Lanka and documentary evidence relating thereto?

[13] The Applicant submits that the Officer's reliance on the BBC News Country Profile amounted to a breach of the duty of fairness owed to him as set out by the Federal Court of Appeal in *Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461 (C.A.) (QL). He holds that the Officer, in finding that there was no objective evidence showing the systemic denial of core human rights, was looking for evidence subsequent to the BBC News article and he was unable to provide such evidence as he had not been advised of the Officer's intention to rely on the information which indicated a change in country conditions. The Applicant asserts that he had submitted ample objective evidence on the systemic denial of core human rights by the government of Sri Lanka which addressed the period previous to the BBC News article. He urges that this is a clear indication that the Officer viewed the BBC News articles as significant information evidencing a change in general country conditions that was determinant in the disposition of the case.

[14] The Respondent contends that disclosure was not required and the Officer did not breach the duty of fairness owed to the Applicant. The Respondent alleges that the Officer merely relied on an updated country report which she has the right to do and that she could not be limited to the materials filed by the Applicant (see *Hassaballa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 489, [2007] F.C.J. No. 658 (QL)). The Respondent further submits that the

Applicant was not denied a meaningful opportunity to fully present his case as to risk as the BBC News report is a publicly available document, containing information that is widely reported, and one could presume that the Applicant and his counsel would be aware of its existence (*Al Mansuri v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 22, [2007] F.C.J. No. 16 (QL)).

[15] In *Mancia*, the Federal Court of Appeal clearly established the threshold for procedural fairness when an officer relies on a document from a public source in relation to general country conditions which became available after the filing on the submissions. The duty of fairness requires that an officer disclose such documents where they are “novel and significant and where they evidence changes in the general country conditions that may affect the decision” (at paragraph 28).

[16] The Applicant contends that the BBC News Country Profile used by the Officer should have been disclosed. In her reasons, the Officer’s reviews two pieces of documentary evidence, one dated from 2008 and the other from 2006, which detail a variety of human rights violations in Sri Lanka where the majority of the victims were Tamils. She then writes: “I acknowledge the changing circumstances in Sri Lanka; however, recent events indicate that the government has almost achieved total control of the country. I have no objective evidence before me that the government of Sri Lanka is subjecting Tamil citizens to a sustained and systemic denial of their core human rights.” She references the BBC News Country Profile in support of the first statement.

[17] Based on the reasons, it is clear the article had a significant impact on the Officer's decision. Relying on the country conditions described in the BBC News Country Profile, the Officer essentially discounted all of the other documentary evidence presented by the Applicant in support of his claim. This is quite different from the cases relied on by the Respondent where the documents in question were updated versions of reports submitted by the claimants and where the claimants had submitted other documents that addressed similar issues. Here, the Applicant submitted extensive documentary evidence from well-known sources but could not know that it would be discounted on the basis of one news article showing an improvement in country conditions. I agree with the Applicant that the Officer did more than merely rely on an updated country report and he could not fully and fairly present his case as a consequence. Thus, I find that the document should have been disclosed and the failure to do so was a breach of the duty of fairness.

[18] No question was submitted for certification and none arises.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be granted. The matter is remitted back to a newly appointed Officer for redetermination. No question is certified.

“Michel Beaudry”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-2178-09

STYLE OF CAUSE: **MAHENDRAN, Indrakumar
and
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 2, 2009

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

DATED: December 4, 2009

APPEARANCES:

John W. Grice FOR APPLICANT

Nimanthika Kaneira FOR RESPONDENT

SOLICITORS OF RECORD:

John W. Grice FOR APPLICANT
Toronto, Ontario

John H. Sims, Q.C. FOR RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario