

Federal Court



Cour fédérale

Date: 20100809

Docket: IMM-6034-09

Citation: 2010 FC 811

Ottawa, Ontario, August 9, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

KAMALALOJANI PARAMASIVAM

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of an Officer of the Immigration Section of the High Commission of Canada in Sri Lanka (Officer), dated October 5, 2009 (Decision), which refused the Applicant's application for a temporary resident visa (TRV) to Canada.

BACKGROUND

[2] The Applicant, a citizen of Sri Lanka, applied for a TRV to visit her ill brother-in-law and his family as well as another brother in Canada. The Applicant has numerous siblings, including 3 in Canada and 4 in Sri Lanka. She also has a child living in New Zealand.

[3] The Applicant's brother in Canada provided the Applicant with an invitation to visit. The Applicant applied for a TRV to visit Canada but received a negative decision on August 19, 2009.

[4] The Applicant's family then provided more documentation, including information with regard to their financial status as well as a letter of reference from a Member of Parliament. The Applicant applied again for a TRV and was refused on October 5, 2009.

DECISION UNDER REVIEW

[5] The Officer determined that the Applicant had failed to prove that she would leave Canada at the end of the temporary period if she was authorized to visit. This determination was based on consideration of her ties to Sri Lanka (residence and citizenship) and factors which might motivate her to stay in Canada.

[6] The Officer noted the purpose of the Applicant's visit, including visiting her sick brother-in-law, as well as not having seen his children. The Officer also noted the Applicant's claim that she is a principal of a medical college in Jaffna and that she received approval for leave from her employer.

[7] However, the Officer determined that the Applicant's previous application on the same grounds had been refused and that he could find no fault with the refusal grounds. He felt that the Applicant had demonstrated "very few ties" to Sri Lanka. Furthermore, he noted that she is a 69-year-old widow, although she "claims to still be employed." The Officer also noted that the Applicant has a limited travel history, having only visited South Africa and India.

[8] Based on the above factors, the Officer was not satisfied that the Applicant had enough ties to Sri Lanka to ensure her return.

ISSUES

[9] The Applicant submits the following issues on this application:

1. Did the Officer err in denying the Applicant's TRV?
2. Was the failure to provide an opportunity for an interview or a right to respond to any concerns the Officer may have had a violation of procedural fairness?
3. Were the reasons given sufficient to satisfy the requirement of procedural fairness?

STATUTORY PROVISIONS

[10] The following provisions of the Act are applicable in these proceedings:

Application before entering Canada

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

Obligation on entry

20. (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,

...

(b) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.

Visa et documents

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

Obligation à l'entrée au Canada

20. (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :

...

b) pour devenir un résident temporaire, qu'il détient les visa ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée.

[11] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 are also applicable in these proceedings:

Issuance

Délivrance

179. An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign national

179. L'agent délivre un visa de résident temporaire à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :

(a) has applied in accordance with these Regulations for a temporary resident visa as a member of the visitor, worker or student class;

a) l'étranger en a fait, conformément au présent règlement, la demande au titre de la catégorie des visiteurs, des travailleurs ou des étudiants;

(b) will leave Canada by the end of the period authorized for their stay under Division 2;

b) il quittera le Canada à la fin de la période de séjour autorisée qui lui est applicable au titre de la section 2;

(c) holds a passport or other document that they may use to enter the country that issued it or another country;

c) il est titulaire d'un passeport ou autre document qui lui permet d'entrer dans le pays qui l'a délivré ou dans un autre pays;

(d) meets the requirements applicable to that class;

d) il se conforme aux exigences applicables à cette catégorie;

(e) is not inadmissible; and

e) il n'est pas interdit de territoire;

(f) meets the requirements of section 30.

f) il satisfait aux exigences prévues à l'article 30.

STANDARD OF REVIEW

[12] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[13] Questions of procedural fairness are reviewed on a standard of correctness. See *Weekes (Litigation Guardian) v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 293, 71 Imm. L.R. (3d) 4. As such, the issue of whether procedural fairness was breached by: a) the Officer's failure to provide an interview or an opportunity to respond to concerns; or b) the inadequacy of reasons is reviewable on a standard of correctness.

[14] The issue of whether the Officer erred in his decision to deny the TRV is one of discretion and deserves deference. See *Danioko v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 479, [2006] F.C.J. No. 578 at paragraphs 16-19. As such, this issue will be considered on the standard of reasonableness.

[15] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put

another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

ARGUMENTS

The Applicant

Procedural Fairness

[16] The Applicant contends that the Officer erred in failing to provide her with an interview, even though she was present at the visa office and requested an interview because of her first failed TRV application. According to the Applicant, the Officer erred in refusing her application without interviewing her “even though she was conveniently present in [sic] the premises and requested an interview on the day her application was received, processed and refused.”

[17] According to the Federal Court in *Li v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1284, [2008] F.C.J. No. 1625 at paragraph 35, “procedural fairness requires that an Applicant be given the opportunity to respond to an officer’s concerns under certain circumstances.” The Applicant submits that her application for a TRV gave rise to such circumstances.

[18] The Officer may have considered numerous factors in reaching his decision, including travel documents, the Applicant’s family in Canada, the Applicant’s purpose for travelling (including her brother-in-law’s illness) as well as financial means. However, the refusal of the TRV does not seem to be based on any of these factors.

[19] Rather, the Applicant was denied a TRV because the Officer believed that there were factors motivating her to stay in Canada and that she would not leave when required. However, there was no material before the Officer suggesting that the Applicant had any intention of remaining in Canada. Furthermore, the Applicant has not previously attempted to visit and remain in Canada, although she has had family here for over two decades.

[20] If the Applicant were to leave Sri Lanka, she would leave behind her employment, her position as a Justice of the Peace, as well as her family ties, which are stronger in Sri Lanka than in Canada. Moreover, remaining in Canada would take her farther away from her only child, who resides in New Zealand, and her mother who continues to reside in Sri Lanka (a fact that was not acknowledged by the Officer although this information was before him).

[21] In considering the evidence, the Officer also doubted that the Applicant could still be employed because she is a 69-year-old widow. The Applicant suggests that it is unreasonable to infer that a 69-year-old widow could not be employed. Moreover, the Officer failed to consider the employment documents provided by the Applicant in reaching this conclusion.

Evidence

Ignored relevant evidence

[22] The Applicant says that the Officer further erred by ignoring relevant evidence. For instance, the Officer did not recognize the Applicant's extensive history of international travel, which included a trip to South Africa to visit her daughter who was there at the time. The Officer also failed to consider that the Applicant did not attempt to remain beyond her authorized period of stay in other international destinations to which she has travelled.

[23] The Officer also failed to consider the guarantee provided by the Applicant's sponsor. The Applicant contends that denying her access to Canada may affect her ability to gain entry to other countries where she has close relatives, including her only child who is in New Zealand. See, for example, *Ogunfowora v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 471, [2007] F.C.J. No. 637 at paragraph 34.

Erroneous findings of fact

[24] The Decision was also based on erroneous findings of facts such as that the Applicant had never met her host's children, that she no longer has a daughter in New Zealand, and that her daughter was currently visiting Sri Lanka. These findings were made without regard to the evidence before the Officer. If the Officer has evidence that supported such findings, the Officer should have provided the Applicant with an opportunity to speak to these concerns.

[25] Although the Applicant's brother-in-law has now passed away, the Applicant still wishes to visit her now-widowed sister and her family, as well as her brother in Canada.

The Respondent

Reasonable decision

[26] In determining an application for a TRV, the Officer must be satisfied that the foreign national will leave Canada at the expiry of the visa. In this instance, the Applicant failed to discharge the burden upon her to satisfy the Officer in this regard. While the Officer found that the Applicant's host was established in Canada, he also found that the Applicant had demonstrated very few ties to Sri Lanka. As such, the Officer concluded that the Applicant had not provided enough evidence to indicate that she would leave upon the expiry of the TRV.

[27] The Officer considered many factors in this instance, including:

- a. The Applicant's child in New Zealand;
- b. The location of her siblings;
- c. The location of her spouse's siblings;
- d. Her motivation to visit Canada;
- e. Her employment and her approved leave;
- f. Her wages;
- g. Her ownership of property;
- h. Her travel history.

Upon consideration of these factors, it was reasonable for the Officer to determine that the Applicant had few ties in Sri Lanka. The Officer acted reasonably and considered all the evidence before him in reaching a decision. The Applicant is simply asking the Court to reweigh the evidence that was before the Officer, but this is not the role of the Court. See *Baylon v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 938, [2009] F.C.J. No. 1147 at paragraph 25.

Procedural Fairness

[28] There is no statutory requirement that an interview be granted to the Applicant under these circumstances; nor is there any requirement for the Officer to advise the Applicant as to his concerns. See, for example, *Lu v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 440, [2002] F.C.J. No. 579 at paragraph 11 and *Dhillon v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 614, [2009] F.C.J. No. 794 at paragraphs 30-32.

[29] It is the Applicant's onus to provide the Officer with the necessary information to support her application. The Officer is not obligated to approach the Applicant with regard to any concerns or doubts. As stated by Justice Mosley in *Rukmangathan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 284, [2004] F.C.J. No. 317 at paragraph 23, "procedural fairness does not stretch to the point of requiring that a visa officer has an obligation to provide an applicant with a 'running score' of the weaknesses in their application."

[30] The Applicant has also alleged that insufficient reasons were provided for the Decision. However, the Federal Court of Appeal has held that the duty to provide adequate reasons is discharged when the decision-maker sets out its findings of fact and the evidence upon which these findings are based. See *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 at paragraphs 21 and 22.

[31] The Respondent submits that the Court ought to consider whether “the reasons respond to the case’s live issues, having regard to the evidence as a whole and the submissions.” As such, inadequate reasons are those that are so deficient that they “foreclose meaningful appellate review.” See *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788 at paragraphs 24-25.

[32] The Applicant has also implied that the Officer relied on extrinsic or other evidence in reaching his Decision. However the Officer does not state anywhere in the Decision that he considered any information outside of what was provided. As such, the CAIPS notes from the August 2009 decision need not be considered or included in this instance.

Procedural issue

[33] The Respondent concedes that the CAIPS notes may have been unintentionally cut off during the facsimile process due to differing paper sizes. However, a complete record has now been provided in the form of the Certified Tribunal Record.

Evidence

[34] The Applicant suggests that if all the facts, including the Applicant's mother still living in Sri Lanka were properly weighed, the only result could be a positive decision. However, it is not the Court's prerogative to re-weigh the evidence that was before the Officer. See *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] F.C.J. No. 457. Rather, the weighing of evidence deserves deference.

[35] Furthermore, the Decision does not suggest that the Officer ignored or misconstrued the evidence before him in any way.

ANALYSIS

[36] The Officer has chosen to provide a very brief Decision in this case. Not a great deal is required in the case of an application for a TRV but what we have in this instance are reasons that cannot be clearly understood when compared with the evidence that was submitted with the TRV application.

Previous Application

[37] The CAIPS notes reveal that the Officer reviewed and took into account the previous decision regarding the Applicant's attempt to obtain a TRV:

This applicant previously applied for a TRV to visit her terminally ill brother in law. That application was submitted in August 2009 and was refused. I can find no fault in the refusal grounds. This application is essentially the same as the last.

[38] The CAIPS notes for the first application have not been provided by the Respondent so that it is not possible to review the Officer's assessment and reliance upon the previous decision. The Respondent's position is that the Officer's comments concerning the previous decision are neutral. At the very least, however, they suggest that the Officer may not have been fully aware of all of the materials that were submitted with the second application.

Ties to Sri Lanka

[39] The principal basis for the Decision appears to be the Officer's perception of the Applicant's ties to Sri Lanka:

The applicant however demonstrates very few ties to Sri Lanka. She is widowed and 69 years old although she claims to be still employed. It would appear she has never met her hosts children. Her own child resides in New Zealand but may currently be in Sri Lanka on a visit.

[40] These are inaccuracies in this assessment:

- a. The Applicant has met her host's children, although not for some time;

- b. The Applicant's daughter does reside in New Zealand but was not on a visit to Sri Lanka;
- c. The Applicant more than "claimed" to be employed. She provided written proof that she was employed as the Principal of a Medical College and there was no reason to doubt this fact.

[41] The inaccuracies referred to in (a) and (b) above may not matter, but what is important is that the demonstrated links to Sri Lanka were as follows:

- a. The Applicant was employed as the principal of a medical college;
- b. The Applicant is paid a salary for her job and she had been granted temporary leave by the college;
- c. The Applicant owns property in Sri Lanka;
- d. The Applicant has money in Sri Lanka;
- e. The Applicant has three brothers and one sister in Sri Lanka who live near her;
- f. The Applicant has a 94-year-old mother in Sri Lanka who lives in the same area as the Applicant;
- g. The Applicant has lived all her life in Sri Lanka;
- h. The Applicant is a Justice of the Peace in Sri Lanka.

[42] I do not believe that these facts can be reasonably assessed as demonstrating "very few ties to Sri Lanka." In coming to such a conclusion the Officer has obviously overlooked significant material facts that were before him.

Travel Experience

[43] The Officer also asserts that the “applicant has a limited travel history having visited South Africa and India.” It is not clear why this should be regarded as “limited,” because the requirement only asks for travel within the previous six months and, in that time, the Applicant had travelled to South Africa once and to India on several occasions and had returned to Sri Lanka.

Other Issues

[44] One important piece of evidence that is not referred to in the Decision is the letter from the Applicant’s brother which read, in part, as follows:

My sister has no intention of abandoning Sri Lanka as her place of residence. I can guarantee that she will return to Sri Lanka after the purpose of the visit is served. I have been working for the Federal Government of Canada for the past 22 years. I worked for Canada Immigration before joining Immigration and Refugee Board (IRB). My current position is Tribunal Officer with the Refugee Protection Division (RPD). I am scheduled to start a long term acting position as an Assistant Director/RPD in late October 2009. I can assure you that I will not let my reputation to be tarnished by inviting my sister to Canada for a temporary purpose unless it is genuine.

[45] These may not be the Applicant’s own words but they are certainly a material fact that was overlooked. It seems only reasonable to me that, given the brother’s role in our immigration system,

that the Applicant would leave it to him to provide the reassurance that she would be returning to Sri Lanka.

Conclusions

[46] Although discretionary decisions require deference, I believe that the Officer's Decision in this case was based on unreasonable findings and a failure to consider and assess important information that was before him.

[47] First, the Officer erred in his balancing of the factors which might prompt the Applicant to stay as opposed to those factors which suggest she would return to Sri Lanka. In order to properly balance the Applicant's family ties in Sri Lanka, the Officer ought to have considered the presence of all of the Applicant's family in Sri Lanka – including her mother. In fact, the Officer shows no awareness of the Applicant's ties to Sri Lanka when he describes them as “very few.” This suggests to me that they were either left out of account or unreasonably assessed. Either way, this renders the Decision unreasonable.

[48] The Officer further erred by implying that the Applicant had falsified her state of employment. Indeed, the Officer had information to support the Applicant's claim. He erred by failing to properly consider this evidence in determining the truthfulness of the Applicant's claim of employment. As noted by the Applicant, it is unreasonable to infer that a 69-year-old widow could

not be employed. This is especially so where there are documents before the Officer that support a contrary conclusion.

[49] The Officer has also overlooked highly material evidence provided by the Applicant's brother who is employed by the Federal Government of Canada as described in his letter.

[50] Based on the accumulation of errors that occurred in this case, I believe that the Decision is unreasonable and should be returned for reconsideration.

[51] The Applicant has also raised procedural fairness issues but, given my conclusions on the Officer's handling of the evidence, it is not necessary for me to deal with additional grounds.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed, the Decision is quashed and the matter is returned for re-determination by a different officer;
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-6034-09

STYLE OF CAUSE: KAMALALOJANI PARAMASIVAM

APPLICANT

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

RESPONDENT

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 14, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:**

HON. MR. JUSTICE RUSSELL

DATED: August 9, 2010

APPEARANCES:

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