

Federal Court



Cour fédérale

Date: 20110504

Docket: IMM-5860-10

Citation: 2011 FC 524

Ottawa, Ontario, May 4, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

RAJENDRAM SUJEEVAN

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*, SC 2001, c 27 (the Act), for judicial review of a decision of an immigration officer (the officer), dated July 19, 2010, wherein the officer denied the application for permanent residence as a member of the federal skilled worker class.

[2] The applicant requests:

1. that the decision be set aside and remitted to a different immigration officer for redetermination; and
2. an order of *mandamus* requiring the respondent to reconsider the application in accordance with the principles of natural justice.

Background

[3] Rajendram Sujeevan (the applicant) is an ethnic Tamil citizen of Sri Lanka.

[4] In April 2007, the applicant applied for permanent residence as a member of the federal skilled worker class under the National Occupation Classification (NOC) 1111 – financial auditors and accountants.

[5] In his application, the applicant acknowledged that he would not meet the points requirements based on the criteria of subsection 76(1) of the Act and he requested humanitarian and compassionate (H&C) consideration under section 25 of the Act. He alleged that he fears living in Vavuniya, Sri Lanka, due to the violence and human rights violations against Tamil youth.

[6] The applicant avers in his affidavit that the officer told the applicant at the beginning of the interview that she was of Sinhalese ethnicity and that she has information that the political problems in Sri Lanka have been resolved.

Officer's Decision

[7] In a refusal letter, the officer determined that the applicant did not meet the requirements to become economically established in Canada under subsection 76(1) as he received only 20 out of a possible 100 points.

[8] The officer was not satisfied that sufficient H&C considerations existed to allow an exemption from the criteria of the Act. The Computer Assisted Immigration Processing System (CAIPS) notes indicate that the officer reviewed the applicant's police certificate and confirmed that he had never been arrested or detained by any government forces or other groups. The officer noted the applicant's receipt of a complaint at the Human Rights Commission. However, she gave this and the police certificate little weight as the body of these documents were not provided. The officer acknowledged the applicant's allegations that various groups have visited his home daily since November 2007 asking for money. However, the officer found this incredulous as the applicant indicated his family has avoided any serious consequences for not cooperating with these groups. The officer further noted that the applicant and his family had not considered internal migration within Sri Lanka which would be a viable option as both parents are working in government positions.

[9] The officer refused the application for permanent residence.

Issues

[10] The applicant submitted the following issues for consideration:

1. Did the officer breach the principles of natural justice by making remarks in the interview and the reasons that demonstrate a reasonable apprehension of bias against the applicant?
2. Did the remarks of the officer at the beginning of the interview lead to her decision that H&C consideration do not apply to the applicant by breaching the procedural fairness in not accepting the documentary evidence that the applicant provided at the interview together with the prejudging of the country situation and taking into consideration without providing the evidence on which the officer reached a conclusion that the situation in Sri Lanka has returned to normal?
3. Did the officer breach procedural fairness by not giving the applicant an opportunity to address his concerns with regard to the documentary evidence that she has relied on in prejudging the applicant's application for immigration to Canada to be considered on humanitarian and compassionate considerations?
4. Did the officer breach procedural fairness by not accepting the documentary evidence that the applicant tendered and failing to take into consideration the totality of the evidence, which was properly before her?
5. Did the officer breach procedural fairness by not providing the applicant adequate reasons why the humanitarian and compassionate consideration do not apply, particularly after refusing to consider the documentary evidence the applicant submitted and the evidence on which she has relied in making a finding of fact that the country situation in Sri Lanka has returned to normal?

6. Is the decision of the officer unreasonable after she failed to observe the principles of natural justice and breached the procedural fairness as require by the law?

[11] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the officer deny the applicant procedural fairness?
3. Was the officer's decision reasonable?

Applicant's Written Submissions

[12] The applicant submits that a high level of fairness was required from the officer in this case.

[13] According to the applicant, remarks made by the officer at the beginning of the interview indicated a reasonable apprehension of bias that the officer had made up her mind on the country conditions of Sri Lanka and was not open to assessing the application on humanitarian and compassionate grounds.

[14] The applicant further submits that the officer did not provide him an opportunity to respond to her concerns, that she consulted extrinsic evidence and did not consider the totality of the evidence before her.

[15] Finally, the applicant submits that the officer did not provide adequate reasons for why the applicant did not meet the H&C considerations for exemption under section 25 of the Act.

Respondent's Written Submissions

[16] The respondent submits that the minimum standards of procedural fairness vary depending on the context and that the duty of fairness owed by visa officers determining applications for permanent residence is on the lower end of the spectrum.

[17] The respondent submits that the officer did not breach procedural fairness. She considered and assessed the applicant's evidence including a receipt from the Human Rights Commission and a police certificate. Further, the officer never disclosed her Sinhalese ethnicity in the interview. The applicant was able to respond to any of the officer's concerns and present evidence.

[18] The respondent further submits that the reasons of the officer were also adequate. In no way did the reasons received by the applicant prejudice his ability to seek judicial review. Further the reasons indicate the factors considered by the officer and that they did not represent unusual, undeserved or disproportionate hardship.

Analysis and Decision

[19] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[20] A visa officer's determination of eligibility for permanent residence under the federal skilled worker class involves findings of fact and law and is reviewable on a standard of reasonableness (see *Malik v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1283 at paragraph 22).

[21] Any issues of natural justice involving visa officers, however, are evaluated on a correctness standard (see *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 43).

[22] **Issue 2**

Did the officer deny the applicant procedural fairness?

The Supreme Court of Canada held in *Cie pétrolière Impériale c Québec (Tribunal Administratif)*, [2003] 2 SCR 624 at paragraph 31) that the content of the duty of impartiality will vary with the functions of the decision maker and the nature of the question being decided. The Federal Court of Appeal held in *Patel v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 55 at paragraph 10 that:

The content of the duty of fairness owed by a visa officer when determining a visa application by an applicant in the independent category is located towards the lower end of the range.

This must be taken into account when assessing the various ways the applicant submits that the officer breached his right to procedural fairness.

[23] First, the applicant submits that the officer prejudged his application and exhibited a reasonable apprehension of bias by disclosing her Sinhalese ethnicity.

[24] The test for a reasonable apprehension of bias, as stated by the Supreme Court, is whether an informed person, viewing the matter realistically and practically, would conclude that it is more likely than not that the decision maker would not decide fairly (see *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at 394).

[25] The applicant has not met the test for reasonable apprehension of bias.

[26] The officer avers in her affidavit that at no time did she discuss her ethnicity with the applicant or think it was relevant to his application. Further the applicant made several statements in his affidavit which are not correct and for this reason, I prefer the sworn evidence of the officer to that of the applicant.

[27] For example, the applicant misrepresented the date of his interview. At page 11 of the applicant's record in his affidavit, the applicant swears that:

...my lawyers were informed that the interview, which was scheduled to be held for me on July 14, 2010, has been postponed to be held on July 26, 2010 [...]

I attended the interview on July 26, 2010 as requested along with the documents, which I was asked to bring for the interview.

[28] However, the CAIPS notes, which include a date imprint for when information is recorded that cannot be altered, indicate the applicant showed up to the High Commission on July 12, 2010 and was interviewed on that day (see tribunal record page 6).

[29] Further, the applicant swears in his affidavit at page 12 of the applicant's record that:

The Immigration Officer did not ask me any questions other than my education and my work experience. [...] She did not allow me or ask any question about my personal hardships to continue to live in Vavuniya.

[30] However, the CAIPS notes indicate that the officer asked the applicant multiple questions about his concerns in Sri Lanka:

Q. WHY DO YOU WANT TO GO TO CDA? I HAVE MANY PROBS IN SL.

Q. WHO IS GIVING YOU PROBLEMS? SOME GROUPS.

Q. WHO ARE THESE GROUPS? I DON T KNOW.

Q. HOW DO YOU KNOW ITS MORE THAN 1 GROUP? THEY COME TO OUR HOUSES AND ASK FOR MONEY . . KEEP GUN TO MY HEAD.

Q. HOW DO YOU KNOW THAT'S ITS MORE THAN 1 GROUP? EVERY NIGHT THEY COME TO HOME AND ASK FOR MONEY.

Q. YOU ARE NOT ANSWERING MY QUESTION. YOU TELL ME THAT SEVERAL GROUPS ASK FOR MONEY AND YOU STILL HAVE NOT TOLD ME HOW YOU KNOW THAT ITS NOT JUST ONE GROUP? DIFFERENT PEOPLE COME AND ASK.

Q. WHEN DID THIS PROBLEM START? IN NOV 2007.

Q. ARE THESE MEN ASKING MONEY FROM YOU OR YOUR FAMILY? FROM MY FAMILY (MY PARENTS).

Q. SO WHAT DOES YOUR FATHER DO WHEN THE GROUPS ASK MONEY FROM HIM? HE GAVE MONEY.

Q. HOW MUCH MONEY HAS HE GIVEN IN TOTAL? 4 GOLD SOVERIGNS AND RS 30,000 IN GOLD.

Q. HOW OFTEN ARE THESE GROUPS VISITING YOU? THEY COME IN THE NIGHT.

Q. HOW OFTEN ARE THESE GROUPS COMING? EVERY NIGHT.

Q. SINCE NOV 2007 YOU ARE TELLING ME THAT A GROUP COMES ASKING FOR MONEY EVERY NIGHT? YES.

Q. WHY DO THEY RETURN WHEN YOU HAVE GIVEN THEM THE MONEY? THEY WANT MORE.

[31] The officer then asked 22 more questions concerning the applicant's problems in Sri Lanka.

[32] Consequently, I find that the officer did not disclose her ethnicity nor rely on it while determining the application for permanent residence, as she swears in her affidavit.

[33] Second, the applicant submits that the officer did not consider the totality of the evidence or that she considered extrinsic evidence. Yet, there is nothing to indicate that the officer consulted extrinsic evidence during her assessment of the application. Further, it is clear from the CAIPS notes that the officer did consider the documentary evidence provided by the applicant. The officer considered the applicant's police certificate and Human Rights Commission complaint. However, the officer gave little weight to these documents as the applicant stated that the body of the documents was being translated and he only provided the "receipt" from the Human Rights Commission complaint.

[34] Third, the applicant submits that he was not provided an opportunity to respond to the officer's concerns. However, even a superficial reading of the CAIPS notes indicates that the applicant had several opportunities to address the officers concerns. He was able to provide documentary evidence of his hardship in Sri Lanka and he was given multiple opportunities to

respond to her questions and concerns about the groups that have been harassing the applicant and his family.

[35] Finally, the applicant submits that the officer did not provide adequate reasons.

[36] The jurisprudence is clear that the CAIPS notes explicitly form part of the reasons for the decision (see *Ziaei v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1169 at paragraph 21; *Toma v Canada (Minister of Citizenship and Immigration)* 2006 FC 779 at paragraph 10).

[37] The officer provided adequate reasons. She indicated that the applicant had not met the required points under the Act for permanent residence as a federal skilled worker. She further indicated in the CAIPS notes that the applicant has never been arrested or detained, that the applicant did not provide sufficient evidence to demonstrate that unknown groups have visited him over 1,000 times demanding money. For these reasons, the officer concluded that sufficient H&C considerations did not exist. These constitute adequate reasons.

[38] I am unable to find any instance where the officer breached the applicant's right to procedural fairness or natural justice.

[39] **Issue 3**

Was the officer's decision reasonable?

The applicant clearly did not meet the 67 points required by subsection 76(1) of the Act for permanent residence under the federal skilled worker class. The officer assessed the H&C

considerations but she was not satisfied with the veracity of the applicant's allegations nor that he had provided sufficient evidence to support his claim. Given the above assessment, this was a reasonable decision.

[40] I would therefore dismiss the application for judicial review.

[41] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[42] **IT IS ORDERED that** the application for judicial review is dismissed.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions*Immigration and Refugee Protection Act, SC 2001, c 27*

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, 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 obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

...

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

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, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

...

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

Immigration and Refugee Protection Regulations, SOR/2002-227

76. (1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:

(a) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,

(i) education, in accordance with section 78,

76. (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :

a) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :

(i) les études, aux termes de l'article 78,

- | | |
|--|---|
| (ii) proficiency in the official languages of Canada, in accordance with section 79, | (ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79, |
| (iii) experience, in accordance with section 80, | (iii) l'expérience, aux termes de l'article 80, |
| (iv) age, in accordance with section 81, | (iv) l'âge, aux termes de l'article 81, |
| (v) arranged employment, in accordance with section 82, and | (v) l'exercice d'un emploi réservé, aux termes de l'article 82, |
| (vi) adaptability, in accordance with section 83; and | (vi) la capacité d'adaptation, aux termes de l'article 83; |
| (b) the skilled worker must | b) le travailleur qualifié : |
| (i) have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount equal to half the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members, or | (i) soit dispose de fonds transférables — non grevés de dettes ou d'autres obligations financières — d'un montant égal à la moitié du revenu vital minimum qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille, |
| (ii) be awarded the number of points referred to in subsection 82(2) for arranged employment in Canada within the meaning of subsection 82(1). | (ii) soit s'est vu attribuer le nombre de points prévu au paragraphe 82(2) pour un emploi réservé au Canada au sens du paragraphe 82(1). |
| (2) The Minister shall fix and make available to the public the minimum number of points required of a skilled worker, on the basis of | (2) Le ministre établit le nombre minimum de points que doit obtenir le travailleur qualifié en se fondant sur les éléments ci-après et en informe le public : |
| (a) the number of applications by skilled workers as members of the federal skilled worker class currently being processed; | a) le nombre de demandes, au titre de la catégorie des travailleurs qualifiés (fédéral), déjà en cours de traitement; |
| (b) the number of skilled workers projected to become permanent residents according to the report to Parliament referred to in section 94 of the Act; and | b) le nombre de travailleurs qualifiés qui devraient devenir résidents permanents selon le rapport présenté au Parlement conformément à l'article 94 de la Loi; |

(c) the potential, taking into account economic and other relevant factors, for the establishment of skilled workers in Canada.

c) les perspectives d'établissement des travailleurs qualifiés au Canada, compte tenu des facteurs économiques et autres facteurs pertinents.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5860-10

STYLE OF CAUSE: RAJENDRAM SUJEEVAN
- and -
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

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**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: May 4, 2011

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