Federal Court  Cour fédérale

Date: 20110510

Docket: IMM-6087-10

Citation: 2011 FC 536

Ottawa, Ontario, May 10, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

THISOKLAL GNANAGURU AND GNANAGURU VELUMMYLUM

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] Mr. Thisoklal Gnagaguru, one of the Applicants in this matter, wishes to sponsor his father, Mr. Velummylum Gnanaguru (the Father), and his Father's family to come to Canada from Sri Lanka. In a decision dated September 27, 2010, a visa officer (Officer) in the High Commission of

Canada in Sri Lanka refused the sponsored application for permanent residence for the Father, on the basis that the Father was inadmissible to Canada. The Officer concluded that the Father was inadmissible, pursuant to s. 40(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for misrepresenting or withholding material facts. Moreover, the Officer determined that humanitarian and compassionate (H&C) factors did not justify granting the Father permanent residence status or any exemption from any obligation under IRPA. The Applicants seek to overturn the Officer's decision.

II. Issues

[2] The issues raised by this application are the following:

1. What is the appropriate standard of review?

2. Did the Officer err in concluding that the Father was inadmissible?

3. Did the Officer err in considering the H&C factors without proper notice to the Applicants?

4. Should special relief be awarded in this case?

[3] For the reasons that follow, I conclude that the inadmissibility determination was not unreasonable. However, I also find that the H&C determination was made without proper notice to the Applicants and should be re-considered.

II. Statutory Provisions

[4] The applicable statutory provisions are as follows:

Immigration and Refugee Protection Act (S.C. 2001, c. 27)	*Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)
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.	**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.
40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40.** (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(*a*) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;**[**	*a*) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

III. Analysis

A. *Issue #1: What is the appropriate standard of review?*

[5] The two substantive issues in this application for judicial review are with respect to the Officer's decision that (a) the Applicant was inadmissible due to material misrepresentation, and (b) H&C factors did not warrant relief.

[6] The decision of a visa officer as to whether an applicant is inadmissible should be afforded deference by the Court and, thus, reviewed on a standard of reasonableness (see, for example, *Kumarasekaram v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1311; *Karami v Canada (Minister of Citizenship and Immigration)*, 2009 FC 788). In addition, since the Supreme Court's decision in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, it has been well-established that the standard of review applicable to H&C decisions made by visa officers is reasonableness.

[7] On this standard of review, the Court should not intervene unless the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para. 47).

[8] The issue of whether the Applicants were given proper notice that the Officer would conduct an H&C assessment is a question of procedural fairness, reviewable on a standard of correctness.

B. *Issue #2: Did the Officer err in concluding that the Father was inadmissible?*

[9] As reflected in the decision letter, the Officer found three areas of material misrepresentation in the Father's evidence: details of his employment or past activities; details of his detention; and his address history. In a letter dated August 25, 2010 (Fairness Letter), the Officer provided the Father with notice of these concerns and gave him an opportunity to reply. The Father provided written responses to the Fairness Letter. The Applicants argue that the Officer erred in each of the three findings.

(1) Cumulative

[10] A preliminary argument made by the Applicants is that the three findings are "cumulative", meaning that, if the Officer erred with respect to one of the three findings, the entire decision must be set aside. This is not correct.

[11] In this case, the Officer made three separate findings of material misrepresentation. In general, any one material misrepresentation, on its own and if not made in error, is a sufficient basis for a conclusion that an applicant has misrepresented material facts and is inadmissible. It follows that, unless all three findings with respect to the Father were made in error, the decision of inadmissibility should not be disturbed.

[12] The Applicants rely on two cases: *Kozman v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 714 and *Peng v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 119 (CA). In my view, neither of these cases assists the Applicants.

[13] In *Kozman*, the issue was a question of the effect of an inappropriate line of questioning on the part of a tribunal member. The tribunal had asked the applicant numerous questions regarding why she had chosen to take a solemn affirmation instead of an oath on the Bible when she was a religious person. The Court allowed the application for judicial review because it was impossible to tell on the record the effect that this line of questioning may have had on the Board's consideration of the evidence. This is clearly different from the present case.

[14] In *Peng*, the tribunal had come to the erroneous conclusion that the applicant was not a resident of Canton, but rather, it was likely she came from Hong Kong. The Court found that it could not tell whether this error caused the Board to come to a different conclusion. Once again that is not the situation before me.

(2) Addresses

[15] The Officer noted that the Father's submissions on his "address history" were inconsistent. In the Fairness Letter, the Officer outlined his concern as follows:

> Your address history changes considerably according to what information source I review. Your new application now includes new information such as displacement in Dec. 1995 and a return to Jaffna in Jan. 1997. Dates from locations in both Jaffna and Trincomalee differ by some 6 months in comparison to previous applications. I need to understand the truth of your historical locations and why

> information provided by you would vary to such a degree. I note that the addresses of your spouse have changed as well.

[16] In his response, dated September 11, 2010, the Father provided only one reason for the different addresses. He blamed an interpreter who, in 2005, did not include all of his addresses.

[17] As demonstrated by the CAIPS notes (CTR 24), the Officer considered the Father's (referred to as the "PI" in the CAIPS notes) explanation and rejected it as follows:

> The PI tells us that variations in his applications in respect to locations and dates are because an earlier application was filled out by [an] interpreter who did not complete it accurately. The PI does not acknowledge that he was responsible for the accuracy of submitted information. In December of 2008, the PI in the course of an interview signed a declaration that this same 2005 application is truthful, complete and correct. He made no statements at that time that errors could be or were present. I am of the view that the PI misrepresented his location history as a result.

[18] What is also clear from the CAIPS notes is that the Officer considered this to be a material misrepresentation. Whether a fact is material is certainly a matter within the competence of the Officer.

[19] The Applicants have tried to shift the blame to the interpreter, despite the Father's signing of the declaration that the information was true and accurate. The Applicants have also asserted that the Father did not intend to misrepresent his addresses, as evidenced by the fact that he later clarified the addresses. A review of the record shows that this was not a simple misstatement of one address. Rather, the residence history of the Father is replete with contradictions and inconsistencies, not all of which could possibly be blamed on the interpreter.

[20] In sum, it was reasonably open to the Officer to reject the Father's explanation that it was the fault of the interpreter and to find that this was a misrepresentation of a material fact.

(3) Employment history

[21] The Officer also found material misrepresentations with respect to the Father's employment history. The Officer's concern was disclosed in the Fairness Letter. In that letter, the Officer noted that the Father had only stated on his application that he was a fisherman, and that he disclosed later on that he ran a textile shop, and had then provided different dates regarding the closing of the shop. The Officer further noted that the Father could not provide any evidence supporting his assertion that he ran a shop, such as a business license, which the Officer found would have been required at that time. Nor could the Officer find evidence to support the Father's assertion that he was a fisherman (other than a fisherman's ID card issued for 2003), such as a boat registration, a government issued document indicating his occupation, or adequate evidence of participation in a co-op. Moreover, the fisherman's identity document that was produced showed a different address in 2003 than was set out in the Father's application.

[22] In his September 11, 2010 response, the Father attempted to provide some information to address these concerns. These responses were considered by the Officer and found to be insufficient to address the concerns raised.

[23] Contrary to the submissions of the Applicants, I do not find that the Officer was relying on pure speculation as to what documentation would have been available. The problem was the almost

complete lack of corroborating or supporting documentation throughout 35 years of fishing and membership in a co-operative.

[24] In my view, it was reasonably open to the Officer to conclude that the Father had misrepresented his employment history and that such misrepresentation was material.

(4) Detention

[25] The Applicants submit that the Officer erred in concluding that the Father had misrepresented his history by failing to include his detention – on at least three occasions – by LTTE forces. The Father acknowledges that he was detained by the LTTE but asserts that he did not include these detentions because he assumed that the application form was asking only about arrests or detentions by government agents. In his view, the LTTE was never a legal government. The argument appears to be that only agents of the official government of Sri Lanka could arrest and detain individuals. Thus, the Applicants argue, the Father was never detained within the meaning of the application. The Officer did not accept this explanation. Nor do I.

[26] In my view, the forms completed by the Father did not limit the term “detention” to detention by the Sri Lankan government forces. For example, Question 11 on the form completed in 2005 directs an applicant to “Give details of what you have been doing during the past 10 years or since age 18 . . . include jobs held, periods of unemployment, periods of study and any other . . . stays in hospitals, prisons or other places of confinement . . .” (emphasis added). The Question also cautions the Applicant: “You must not leave gaps”. The Father did not list his confinements (or

detentions) by the LTTE, in clear contravention of the directions. If in doubt, the Father would have been well-advised to include the LTTE detentions with an explanation. The fact that he failed to do so raises a question about what he may be trying to hide.

[27] With respect to whether the LTTE formed a "government", I further observe that the Father's explanation does not accord with Mr. Thisoklal Gnagaguru's (his son and sponsor) view of the role of the LTTE within Sri Lanka. In 2008, Mr. Thisoklal Gnagaguru, in his personal information form (PIF) submitted as part of his refugee claim in Canada, made the following statement (CTR 196):

> The LTTE took money from my father who was a businessman, time to time. Whenever my father hesitated to give money to the LTTE he was hit, threatened with arrest and mistreated by the LTTE. We could not do anything to prevent this injustice because the LTTE controlled our area and carried out the civil administration. [Emphasis added]

[28] In the same document, the son refers to the fact that his Father "was arrested and detained by the LTTE". This document makes it clear that the LTTE was perceived by the Applicants as an administrative entity with effective control of its territory and the ability to arrest and detain persons. Whether it was a "legal" government is not the question.

[29] On the basis of the evidence before him, the Officer was justified in concluding that the Father had intentionally omitted reference to his detentions by the LTTE. I am further persuaded that it was not unreasonable for the Officer to conclude that this misrepresentation was material.

(5) Conclusion on Admissibility

[30] In sum, I am not persuaded that the Officer erred in his assessment of the Father's admissibility. It was not unreasonable for the Officer to find, as he did, that:

> You have misrepresented your historical activities, addresses and detainment history. These elements are crucial to a determination of admissibility. Without credible, clear and factual information, I cannot determine that you are not inadmissible. The misrepresentation or withholding of these material facts induced or could have induced errors in the administration of the Act because we could have made incorrect decisions determining your admissibility.

D. *Issue #4: Did the Officer err in dismissing the H&C request?*

[31] Having concluded that the Father was inadmissible due to misrepresentation, the Officer turned his mind to whether an exemption was warranted from this finding based on H&C considerations, pursuant to s. 25(1) of *IRPA*. The Officer concluded that the H&C factors were not so significant to warrant the putting aside of *IRPA* requirements or to overcome the safety and security as determined by the requirement to demonstrate that one is not inadmissible.

[32] The Applicants' main argument is that the Officer assessed the H&C factors without any notice that H&C factors were going to be considered.

[33] The Applicants did not request the Officer to carry out an H&C assessment. Indeed, the Applicants thought that the Father and his family had received H&C approval as part of the tsunami disaster response. This is reflected in an entry in the CAIPS notes in the Certified Tribunal Record:

> PURSUANT TO CIC's RESPONSE TO THE TSUNAMI DISASTER THE APPLICANT HAS BEEN ACCEPTED ON HUMANITARIAN AND COMPASSIONATE GROUNDS AND IS TO BE PROCESSED ON A PRIORITY BASIS (CTR, p. 4)

[34] The Applicants submit that, if they had known that the Officer was going to consider H&C factors and whether they outweighed any inadmissibility concerns, they should have been given notice and an opportunity to make submissions and provide further evidence. On the unique facts of this case, I agree.

[35] This case is extremely unusual. The Father was apparently assessed as part of Canada's tsunami disaster response and, in 2005, granted "pre-approval" as a victim of the disaster. The approval was still subject to finalization based on background checks and other statutory criteria, one of which was the admissibility determination. It was not unreasonable for the Applicants to assume that the Officer's review was limited to making a finding on admissibility. Further, the Fairness Letter does not identify that the Officer would be making a decision with respect to H&C considerations.

[36] In sum, I am satisfied that, on the unique facts of this case, the Father ought to have been provided with an opportunity to make further submissions on H&C factors. By failing to do so, the Officer breached the rules of procedural fairness. On this narrow issue, the application for judicial review will be allowed.

V. Conclusion and Remedies

[37] In conclusion, the Applicants will be successful with respect to the aspect of the Officer's decision that addressed the H&C consideration.

[38] The Applicants seek a number of remedies. I will address these individually:

1. *that the decision be set aside*. I will set aside only that portion of the decision by which the Officer, pursuant to s. 25(1) of IRPA, decided that H&C considerations did not justify granting the Father permanent residence or an exemption from any applicable criteria or obligation of IRPA.

2. *that the Court direct the Respondent, the Minister of Citizenship and Immigration, to accept the Father and his family as permanent residents of Canada*. I will not so direct. Nor would I even if I had found the entire decision unreasonable; this is not an appropriate case for a directed decision, where the Court would be, in effect, taking on the duties and responsibilities of a visa officer.

3. *that, if the Court is not prepared to direct a decision, that the matter be referred to the Respondent's, the Minister of Citizenship and Immigration's, National Headquarters (NHQ) for a decision within 30 days of the Court's order*. The circumstances of this case are unusual in that the decision under review is the second to be made on the same application and the Officer, on this second review, was a

senior counsellor in the Embassy in Colombo. In my view, to avoid any further allegation of unfairness, it would be preferable to have the matter referred to NHQ for the re-consideration of the H&C determination. In light of the fact that, as requested by the Applicants, the re-consideration will be carried out at NHQ and that the Applicants will be permitted to make further submissions, the review will unavoidably take longer than 30 days. Accordingly, I am not prepared to set any time limits. However, I expect that the matter will be dealt with expeditiously.

4. *that costs be awarded on a solicitor-client basis*. There are no special reasons to award costs on this application for judicial review.

[39] Finally I wish to emphasize that my decision that this matter should be considered at NHQ should, in no way, be interpreted as a criticism of the Officer. In my view, the attacks by the Applicants on this Officer, as set out in their submissions, were unwarranted and not founded on any evidence beyond the fact that the application was, for a second time, refused. The administration of justice is not well-served by such attacks on the reputation and integrity of one of Canada's public servants.

[40] Neither party proposed a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that :

1. the decision of the Officer with respect to ss. 11(1) and 40(1)(a) of IRPA is affirmed;

2. the decision of the Officer with respect to s. 25(1) of IRPA is quashed and the matter referred to a different officer of CIC located at National Headquarters of the Respondent, the Minister of Citizenship and Immigration, for re-consideration;

3. the Applicants will be permitted to make further submissions with respect to the s. 25(1) claim;

4. the Respondent, the Minister of Citizenship and Immigration, will assess the s. 25(1) claim as soon as reasonably practicable after receiving the further submissions of the Applicants or of being advised that no further submissions are to be made; and

5. there is no question of general importance for certification.

"Judith A. Snider"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	THISOKLAL GNANAGURU and GNANAGURU VELUMMYLUM v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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