Federal Court  Cour fédérale

Date: 20110928

Docket: IMM-183-11

Citation: 2011 FC 1116

Ottawa, Ontario, September 28, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

SELLATHAMBY VETHARANIYAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of a Visa Officer (Officer) in Colombo, Sri Lanka, dated December 10, 2010. The Officer denied the Applicant's application for a permanent resident visa under subsection 11(1) of the *Immigration and Refugee Protection Act*, RS 2001, c 27 (IRPA).

[2] For the following reasons, the application is dismissed.

I. Background

[3] The Applicant, Sellathamby Vetharaniyam, is a citizen of Sri Lanka. Included in the application are two dependents, the Applicant's wife and son. Another son currently living in Canada sponsored the family.

[4] The Officer determined that the Applicant had failed to discharge his obligation under subsection 11(1) to satisfy him that he was not inadmissible. The Officer did not have a complete picture of the family's background. He was unclear of the immigration history of the spouse's brother, causes and dates of death of close relatives as well as the family's changes of address. Accordingly, the Officer was unable to make a complete assessment of the Applicant's admissibility.

[5] Moreover, the Officer found that by failing to declare two previous detentions (by the Sri Lankan Army for 2-3 weeks in 1983 and the Liberation Tigers of Tamil Eelam (LTTE) for six months in 1992 after refusing to pay a ransom) the Applicant had misrepresented material facts relevant to the matter that could induce an error contrary to subsection 40(1)(a). The Officer did not accept the Applicant's claim that this was due to difficulties filling out the computerized form with the help of a friend. The question was clear and the Applicant had the opportunity to review it and sign an attestation. Arrest and detention history was considered key to determining any security risk to Canada that might be posed by the Applicant. As a result of this finding by the Officer, the

Applicant was inadmissible for misrepresentation for a period of two years under subsection 40(2)(a) and denied an appeal.

[6] In addition, the Officer considered humanitarian and compassionate grounds (H&C) under subsection 25(1). These considerations did not justify granting permanent residence or an exemption from the relevant IRPA criteria.

II. Issues

[7] This application raises the following issues:

(a) Did the Officer err in concluding that the Applicant failed to show he was not inadmissible under subsection 11(1)?

(b) Did the Officer err in finding that the failure to declare two previous detentions constituted a material misrepresentation contrary to subsection 40(1)(a)?

(c) Did the Officer breach procedural fairness in considering humanitarian and compassionate grounds?

III. Standard of Review

[8] Decisions of visa officers related to inadmissibility require deference and are reviewed on a standard of reasonableness (see *Kumarasekaram v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1311, [2009] FCJ No 1625 at para 8; *Karami v Canada (Minister of Citizenship and Immigration)*, 2009 FC 788, [2009] FCJ No 912 at para 14). Reasonableness is

"concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" as well as "whether the decision falls 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).

[9] Questions of procedural fairness are, however, reviewed based on correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, 2009 CarswellNat 434 at para 43).

IV. Analysis

Issue A: Did the Officer Err in Concluding that the Applicant Failed to Show he was not Inadmissible under Subsection 11(1)?

[10] The Applicant disputes some of the findings reached by the Officer. For example, he claims that the exact name of his spouses' siblings is irrelevant to a determination of admissibility under subsection 11(1). Nevertheless, the Applicant expressly concedes an important finding by the Officer that his addresses are relevant to the final determination.

[11] As the Respondent points out, the Applicant is arguing that certain underlying findings are not relevant and is asking this Court to re-weigh the evidence. Moreover, the finding regarding the Applicant's addresses alone is sufficient to ground a finding of inadmissibility.

[12] I agree with the Respondent that this evidence is sufficient. It was reasonable for the Officer to conclude that the Applicant had failed to satisfy him that he was not inadmissible as required under the IRPA based on continued uncertainty related to the family's background.

Issue B: Did the Officer Err in Finding that the Failure to Declare Two Previous Detentions Constituted a Material Misrepresentation Contrary to Subsection 40(1)(a)?

[13] According to *Bellido v Canada (Minister of Citizenship and Immigration)*, 2005 FC 452, [2009] FCJ No 572 at para 27, subsection 40(1) requires two essential elements:
(1) misrepresentations must have been made by the applicant; and (2) those misrepresentations must be material in that they could have induced an error in the administration of the IRPA.

(i) Misrepresentation Related to Detentions

[14] I am unable to accept the Applicant's claim that any misrepresentation related to previous detentions was innocent and therefore the Officer should not have found him in violation of subsection 40(1)(a). He relies on the decision in *Koo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 931, [2008] FCJ No 1152 at paras 25-29 that found an inadvertent error on an immigration form would not amount to misrepresentation. In that instance, however, the error on the form was not considered intentional because the relevant information was previously disclosed and known to the immigration officer.

[15] According to the Officer's Computer Assisted Immigration Processing System (CAIPS) notes in the present case, information related to the Applicant's detention only came to his attention

once the Applicant was confronted. The Officer found it difficult to believe that the Applicant had forgotten he was previously detained for a period of six months. He rejected the Applicant's claim that the error was attributed to his lack of computer skills, finding that the question was clear and there was an opportunity to review before attesting to his answers. Given that information regarding the length of detention only came to light during the interview and there was an opportunity to review the form, the conclusion that a legitimate misrepresentation occurred was reasonably open to the Officer.

[16] In addition, I cannot find in favour of the Applicant's submission that since the LTTE is not a state entity, the detention need not have been disclosed. A recent decision of this Court, *Gnanaguru v Canada (Minister of Citizenship and Immigration)*, 2011 FC 536, [2011] FCJ No 678 at paras 25-26, found that the term "detention" did not refer solely to Sri Lankan government forces and it was a misrepresentation not to include information of prior detention by the LTTE.

[17] I am not persuaded by the Applicant's arguments that this case should not be followed. He makes the assertion that all Tamils would interpret detention on the immigration form as referring solely to state entities and not the LTTE. He also suggests that if detention can be opened up to non-state entities this would automatically imply that any party with the ability to detain will have to be disclosed, including kidnappers, rebel groups or criminals. The nature of what should appropriately be disclosed will depend on the particular situation and the materiality assessed accordingly. It is not unreasonable to expect that a group such as the LTTE, seeking to control areas of Sri Lanka, and with the capacity to detain would warrant further disclosure. Regardless, should I

choose to disregard *Gnanaguru*, above, it would not necessarily alter the outcome of the present case.

[18] Unlike in *Gnanaguru*, above, the Applicant never even alleged any confusion as to what constituted detention on the forms with respect to the LTTE during his interview with the Officer. He simply claimed there were issues filling out the computerized form and checking the correct box. If such a claim had been made, it would be difficult to explain why the Applicant also failed to disclose prior detention by the Sri Lankan Army, an undisputed state entity.

[19] Perhaps more significant is the assertion by the Respondents that detention by the LTTE was at the forefront of the family member's story and experience. It was therefore reasonable for the Officer to conclude that failure to record the previous detentions, by state and non-state entities such as the LTTE, amounted to misrepresentation.

(ii) Materiality

[20] I must also find that it was reasonable for the Officer to conclude that the misrepresentation was material and could have induced an error in the administration of the IRPA.

[21] The Applicant submits that the Officer was required to conduct an analysis the issue of materiality and failed to do so (*Ali v Canada (Minister of Citizenship and Immigration)*, 2008 FC 166, [2008] FCJ No 212 at para 3). He also refers to *Koo*, above, at paragraphs 29-30 where an inadvertent error was not found to be material to the assessment of an application.

[22] The Officer did, however, provide an explanation for his determination that the misrepresentation related to previous detention was material. Indeed, his CAIPS notes remarked: "The answers to the questions are not trivial. Someone's arrest and detention history is key to determining their security risk to Canada." Though the detention events took place some time ago, it was still reasonable for the Officer to insist on being able to properly assess the level of risk.

[23] As the Respondent makes clear, it is not for the Applicant to decide what to answer for and what is material and what is not. He is not entitled to foreclose any possible investigations that might be conducted by an Officer. The purpose of subsection 40(1)(a) is to ensure that Applicants provide complete, honest and truthful information (*Bodine v Canada (Minister of Citizenship and Immigration)*, 2008 FC 848, [2008] FCJ No 1069).

[24] This Court should also be guided by the general principle referred to in *Haque v Canada (Minister of Citizenship and Immigration)*, 2011 FC 315, [2011] FCJ No 394 at para 14:

> In order to adequately protect Canada's borders, determining admissibility necessarily rests in large part on the ability of immigration officers to verify the information applicants submit in their applications. The omission or misrepresentation of information risks inducing an error in the Act's administration.

[25] The Officer's finding that the misrepresentation of previous detentions was material because it affected his ability to assess any potential security risks was justified, transparent and intelligible.

Issue C: Did The Officer Breach Procedural Fairness in Considering Humanitarian and Compassionate Grounds?

[26] The Applicant claims the Officer breached procedural fairness by considering H&C grounds based on the information provided in the permanent residence application. He proposes that the Officer should have questioned whether the best interests of the children would have been affected. He relies primarily on the decision in *Gnanagura*, above, where it was determined that a breach of procedural fairness occurred in considering H&C factors without notice and allowing the applicant to make further submissions.

[27] In this case, however, the Officer indicated in his CAIPS notes that the sponsor had requested H&C consideration based on the effect of the tsunami disaster on his family. The Applicant acknowledged that he was never affected. The Officer noted that the family lived and worked in Sri Lanka for their entire lives and had family support available despite the presence of children abroad. These H&C factors were not found to outweigh the need to demonstrate admissibility.

[28] In *Gnanagura*, above, Justice Judith Snider is clear that her decision was based on the unique facts of the case as that applicant had been approved in principal on H&C grounds and anticipated that admissibility was the only issue being considered. These facts are not replicated in the present case. Given the request to consider H&C factors and the analysis conducted by the Officer, there was no breach of procedural fairness.

V. Conclusion

[29] The Officer reasonably concluded that the Applicant had failed to establish he was not admissible due to uncertain family background. There was a material misrepresentation related to previous detentions. No breach of procedural fairness was committed in the assessment of H&C considerations.

[30] The Applicant proposes the following question for certification: is it a misrepresentation as defined in section 40 of the IRPA to fail to disclose a detention by the LTTE in response to the question have you ever been detained or put in jail? In the alternative, the Applicant suggests that the question be phrased more broadly as whether "being detained" in the context of immigration application forms relate to detention at the hands of agents of a lawful government for an extended period or detention by anyone.

[31] Neither of these questions meets the established criteria. They are specific to the facts of this case and do not contemplate issues of broad significance or general application (see *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, (1994), 176 NR 4, [1994] FCJ No 1637 at paras 4-6 (FCA)). Moreover, they are not dispositive of this appeal since the misrepresentation related to detention by non-state entities is not the only detention at issue (see *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2009] FCJ No 549 at paras 22-29).

[32] Accordingly, this application for judicial review is dismissed. The proposed questions cannot be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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