Federal Court  Cour fédérale

Date: 20111212

Docket: IMM-2426-11

Citation: 2011 FC 1460

Ottawa, Ontario, December 12, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

AWARD NARINE SAMAROO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Minister moved to dismiss the applicant's judicial review application without hearing it on its merits, or alternatively, asked the Court to decline to grant the applicant any relief. The basis for the motion was the applicant coming to the Court with unclean hands because of his failure to comply with a removal order.

[2] The applicant resists the motion. His counsel admits that the applicant failed to report for removal and acknowledges the outstanding warrant for his arrest; however, she submits that the Court ought not to exercise its discretion as asked by the respondent. The parties agree that the relevant factors to consider are those set out by the Court of Appeal in *Thanabalasingham v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 14.

[3] The applicant's judicial review application asks the Court to review and set aside a decision of an immigration officer denying his application for permanent residence in Canada under the spouse or common law partner in Canada class.

[4] For the reasons that follow, the Minister's motion is granted and the application for judicial review is dismissed because the applicant seeks an equitable remedy but has not come to the Court with clean hands.

Background

[5] The applicant is a citizen of Guyana. He was granted a visa to enter Canada after falsely telling the visa officer at Port of Spain, that he was married with two children in Guyana. He entered Canada on May 7, 2003 and filed for refugee protection about six months later. The Refugee Protection Board denied his claim and his application for leave and judicial review was dismissed by this Court. He then made an application for permanent residence on humanitarian and compassionate grounds (the H&C application) and a Pre-Removal Risk Assessment application (PRRA) which were refused in June and October 2009, respectively.

[6] The applicant was scheduled for removal from Canada on November 9, 2010; however, this Court granted him a stay of that removal pending the final determination of his application for leave and judicial review of the decision on his H&C application. However, that application was subsequently discontinued, presumably because of the application that resulted in the decision under review.

[7] About two months after his H&C application was refused, he married Ms. Veronica Singh, a Canadian citizen. On September 17, 2009, he filed an application for permanent residence as a member of the spouse or common law partner in Canada class: Regulation 124(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the spousal sponsorship application).

[8] On February 23, 2011, an immigration officer refused the spousal sponsorship application. That decision, communicated to the applicant on April 4, 2011, is the decision the applicant seeks to have reviewed in this proceeding. Leave to judicially review the decision was filed on April 12, 2011.

[9] On May 16, 2011, Justice Snider dismissed the applicant's motion to stay his deportation scheduled for May 25, 2011 to Guyana pending a final determination of the application for leave and judicial review of the spousal sponsorship application.

[10] The applicant failed to report for removal as directed and on May 26, 2011 a Warrant for Arrest was issued and it remains unexecuted.

[11] There is no dispute that the applicant engaged in the following conduct:

1. The applicant lied to the immigration authorities in order obtain an immigration visa by stating that he had a spouse and two children in Guyana;
2. The applicant commenced a claim for refugee status and took steps to have the negative decision judicially reviewed by this Court when, as he now admits, he knew he was not a refugee but rather simply wanted to stay in Canada; and
3. The applicant failed to report for removal after he was unsuccessful in obtaining a stay of his removal and, as a consequence, is subject to an arrest warrant.

None of these is a matter of minor misconduct. To date, the applicant has used and abused the Canadian immigration and refugee process to his own ends.

[12] The applicant, not disputing his misconduct, points out that the Minister knew of his failure to report for removal before it filed its memorandum in response to the leave application and well before it filed its further memorandum on the application and yet the Minister never raised his conduct as a concern until mere days before the hearing of the judicial review application.

[13] The Court has discretion to dismiss an application for judicial review without considering its merits where the applicant has lied or is guilty of other misconduct: *Thanabalasingham* at para 9. Such discretion must be exercised on a principled basis. The Court of Appeal has indicated that the Court should strike a balance between “maintaining the integrity of and

preventing the abuse of judicial and administrative processes" and "the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights."

[14] In this case the applicant has abused the immigration process on more than one occasion; the recent failure to report for removal is merely the latest abuse. On the other hand, the government has acted lawfully throughout, even though it raises this concern at the eleventh hour. While family unification is important, it is not a "fundamental human right" in Canada.

[15] Balancing these considerations and the need to send a signal to others that one simply cannot engage in such misconduct with impunity, I find that the balance weighs heavily against the applicant in this case. The weighing exercise may have been different had there been a suggestion in this case that the applicant had been denied procedural fairness; there is none.

[16] On the other hand, the Minister should not expect that in every instance it can wait until just prior to a hearing to raise concerns such as that raised here. In my view, the Minister ought to immediately raise allegations of unclean hands when warranted and particularly where the applicant has failed to appear for removal and is subject to a warrant for arrest. Had it been raised at the leave stage, I question whether leave would have been granted in this matter. In any event, had leave been granted, a motion to dismiss on the grounds raised here could have been brought and adjudicated upon well prior to the scheduled hearing date, thus saving Court time and resources.

[17] I would lastly observe that even if I had dismissed the Crown's motion and granted the application on its merits, I would have sent the matter back for redetermination only on condition that the applicant first surrenders himself to the immigration authorities. In my view, an applicant is entitled to an equitable remedy of the sort sought here only if he is not currently in breach of a removal order.

JUDGMENT

THIS COURT'S JUDGMENT is that the respondent's motion is allowed and the application for judicial review is dismissed.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2426-11
STYLE OF CAUSE:	AWARD NARINE SAMAROO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 28, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
DATED:	December 12, 2011

APPEARANCES:

Krassina Kostadinov	FOR THE APPLICANT
Tamrat Gebeyehu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

WALDMAN AND ASSOCIATES Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT