Federal Court Cour fédérale

Date: 20130227

Docket: IMM-2994-11

Citation: 2013 FC 199

Ottawa, Ontario, February 27, 2013

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

LATHEEPAN JEYALOLIPAVAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Latheepan Jeyalolipavan applies for judicial review of the decision of an Immigration Counsellor dated February 3, 2011 refusing his application for permanent residence because the Officer was not satisfied the applicant was not inadmissible to Canada;

[2] For reasons that follow I am granting the application for judicial review.

Facts

[3] The applicant is a young Tamil male from Jaffna, Sri Lanka. He was left was left behind when his family fled Sri Lanka. His parents were accepted as refugees by the Refugee Protection Division of the Immigration Refugee Board on December 17, 2007.

[4] The applicant's parents applied for permanent resident status on March 4, 2008. They included the applicant as a family member in their application. The Case Processing Centre in Vegreville requested the Canadian High Commission Immigration Section [CHC] in Colombo, Sri Lanka to verify the relationship and initiate appropriate checks for the applicant. On March 23, 2008 the CHC requested the applicant to complete forms including an application for permanent residence in Canada.

[5] The applicant completed the application for permanent residence in Canada on July 8, 2008. The CAIPS notes indicate the applicant did not have an agent, was 19 years of age and was not fluent in English.

[6] On April 6, 2009, the CHC wrote to the applicant requesting further information including the Personal Information Form (PIF) of his father. The applicant provided a response indicating the "personal information from my sponsor, i.e. father attached herewith". The CAIPS notes make note of documents received, but not the PIF. On April 9, 2009 the applicant was contacted and the requested PIF and narrative was subsequently provided.

[7] The father's PIF is very clear and precise. It documents two arrests of himself and his son, the applicant, on April 22, 2006 and June 5, 2006 by the EPDP cadres and military. The father was released on both occasions but he had to pay a ransom for the applicant's release. The applicant was then living in the family home. The relevant part of the father's narrative states:

> 12. I was in a very dangerous situation. I could not live in Manipay and was not able to move to another place. My greatest concern was my son's safety. I could not make any arrangements for his safe residence.
>
> 13. On April 22, 2006 a group of EPDP cadres with military persons raided my house in the morning and arrested my son. Immediately after the arrest I visited the EPDP camp and subsequently they detained and questioned me too. I was not allowed to see my son but was demanded to pay 100,000.00 rupees for the release of my son. In the evening they allowed me to go home with the condition that I provide them the ransom.
>
> 14. The next day I went to their camp with 50,000.00 rupees and promised them of providing the balance in two weeks time. Thus they released my son. In two weeks time I paid them the balance to prevent more problems. At this point I believed that I would not face any further problems from them. Still I considered leaving Manipay. I knew that killings by the security forces and paramilitary groups were increasing day by day. A program of killing at least five civilians in Jaffna was undergoing. Disappearances after arrest heightened. I thought about leaving the Qatar while settling my son and wife somewhere else.
>
> 15. The incident on June 5, 2006 brought an end to all my preparations. The security forces and EPDP cadres raided my house on that night and arrested both my son and me. They released me the next day on condition that I should pay them a sum of 500,000.00 rupees to secure my son's release.
>
> 16. The same night they raided my house for the second time and took my passport with them saying that they had come to know about my arrangements to go abroad. I had to make very serious decisions at this point. For the next three days I visited the camp for about five times and offered to pay them 50,000.00 rupees and begged to release my son. Finally they agreed to release for a sum of

> 100,000.00 and demanded 100,000.00 rupees more to return my passport. I paid 100,000.00 rupees and secured my sons release first. I assured them of paying the rest within one month. But within that period I made arrangement for our travel to Colombo.
>
> 17. I feared that we would be caught on our way if all of us leave the house together. So I sent my wife to her relative's house the previous day. The next day, on June 27, 2006, I sent my son to the same house in school uniform in the morning and finally I followed them and left to Colombo together.
>
> 18. In Colombo I stayed at Island Lodge where I used to stay and contacted the travel agent who made arrangements for my travel to Canada. Even though we wanted to leave Sri Lanka together the travel agent could not make such arrangements. While he sent me first he promised to send my wife and son shortly. He understood that I was concerned about the safety of my wife and son in Colombo and said that he would send them very soon or take them to a safe country otherwise.

[8] On June 2, 2009, with the requested PIF in hand, the reviewing officer noted the applicant appeared to have been detained and expressed security concerns.

[9] On July 9, 2009 the CAIPS notes indicated page 1 and 2 missing from schedule 1. They appear to have been located at a later time. On July 15, 2009, a new schedule 1 is sent to the applicant for completion. Letters also were sent to the applicant requesting further information. On September 13, 2010 the CHC wrote:

> 1. Why have you not returned the schedule 1 form mailed to you on 15/07/09?
> 2. Why have you not responded to our request of 29/01/10 requesting your O levels result sheet and proof of post secondary education?
> In order to continue processing your file, please complete your personal history section from the time you were 18 to date leaving no time unaccounted for. Fill in your address history from birth. We also require your O level results and proof of post secondary education.
> 3. Where have you lived since both your parents left the country? Who has been responsible for your care?

4. Outline the problems your parents faced that caused them to flee Sri Lanka and claim refugee status in Canada. Please include how you were affected by these problems.
5. Have you ever been arrested by any force? If so please give details.

[10] As an aside, I must note some imprecision in the questions asked. The applicant is asked for both personal history since 18 and address history since birth. He is asked about his parents' problems that caused them to flee and claim refugee status in Canada (the applicant having been left behind in Sri Lanka) and then asked how he was affected by these problems. It seems to me the questions may require answers beyond the applicant's knowledge.

[11] On being advised of the CHC letter by his parent's legal counsel in Canada, the applicant responded on December 21, 2010. He explained he had not received the earlier letters. He answered the questions. He provided a second schedule 1. He provided education documents. He described his history after his parents' departure taking up from his father's PIF narrative. (His father described leaving the son with a travel agent.) The applicant's narrative continues from the time he stayed with the travel agent after his parent's departure. The applicant referred the CHC to his parent's PIF to summarize the problems faced by his parents and the applicant prior to their departure. He described the two times he was arrested with his father as chronicled in the father's PIF and referred to brief detainments by security during and after his parents departure. In his response he writes:

3. History after parents' departure: after my parents' departure from Sri Lanka, I stayed with travel agent for few weeks time. As I was alone in Colombo, and the conditions were not conducive for my stay, my travel agent feared that I could be arrested by the security forces in Colombo and sent me to Vavuniya where I stayed with my paternal uncle Umapathysivam Apputhurai. He took care of me during my

> stay in Vavuniya. As security conditions worsened in Vavuniya, where indiscriminate killing and abductions increased my relatives decided to send me back to Colombo where the situation was comparatively safer than Vavuniya. When I returned to Colombo my aunt (father's sister) Raveenthirarani Sothiraja took care of me in Colombo. Now I am under the care of Raveenthirarani Sothirajah.
>
> 4. Reasons for parents' departure: Please find enclosed my parents' Personal Information Forms submitted to the Immigration and Refugee Board of Canada. The forms and narratives summarize the problems faced by my parents and me prior to their departure. Kindly refer to the narrative of the Personal Information Form.
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> 5. Arrest and detention: As a young Tamil male from Jaffna, I was arrested on two occasions in addition to numerous brief detentions by the security forces and paramilitary groups during and after my parents' departure from Sri Lanka. The arrests took place in Jaffna during my stay in Manipay, Jaffna.
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> First arrest: The first arrest took place on or around April 22, 2006 subsequent to my sister's departure to Canada to join her husband.
>
> Second arrest: The second arrest also took place on or around June 05, 2006 at my house in Manipay, Jaffna.

[12] The Immigration Officer conducted a review of the application on December 30, 2010 noting the applicant's reply. The Officer questioned the applicant's change in his Schedule 1 form from no arrests or detentions to answering about being detained by security forces and EPDP members. The counsellor picks at dates in the applicant's personal chronology and education record. He questions the applicant's provision of his parent's PIF to describe their problems instead of describing those problems himself. The Officer makes much of the applicant's failure to declare the arrests in the initial application form.

[13] The file was sent on for review. The Officer reviewing the file indicated some minor confusion was understandable but decides the applicant has not shown he is inadmissible because he had changed his Schedule 1 declaration and did not seamlessly clear up all confusion.

Legislation

[14] The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA)* provides:

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.
(2) The officer may not issue a visa or other document to a foreign national whose sponsor does not meet the sponsorship requirements of this Act.	(2) Ils ne peuvent être délivrés à l'étranger dont le répondant ne se conforme pas aux exigences applicables au parrainage.

Standard of Review

[15] The Supreme Court of Canada has held that there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law and fact. The Supreme Court has also held that where the standard of review has been previously

determined, a standard of review analysis need not be repeated. *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

[16] The Federal Court of Appeal has stated that decisions of immigration officers are discretionary decisions based on factual assessments. *Jang v Canada (Minister of Citizenship & Immigration*), 2001 FCA 312, 278 NR 172 at para 12. Judicial deference to the decision is appropriate where the decision making process demonstrates justification, transparency and intelligibility and the decision falls within a range of possible, acceptable outcomes defensible on the facts and in law.

Analysis

[17] The onus is on the applicant to provide the necessary information to satisfy the Officer that he is not inadmissible. This is a statutory requirement as per s. 11(1) of *IRPA*. To do this, the applicant was asked to provide specific information. This included information on the applicant's personal history from the age of 18, documentation to substantiate his education claims, reasons for his parents' fleeing to Canada and details of whether the applicant had been arrested by any force.

[18] It seems to me the most salient aspect of this application is the security issue. This was identified early and is most crucial in regards to the question of whether the applicant is not inadmissible.

[19] On first impression, it would appear that my decision in *Sinnathamby v Canada (Citizenship and Immigration)*, 2011 FC 1421 [*Sinnathamby*] would apply and be decisive in this matter. In that case, the principal applicant failed to disclose his arrest and interrogation by the Sri Lankan navy, a fact which was revealed by the provision of his son's PIF and his later correction. There I noted the immigration officer was tasked with weighing the evidence submitted by the applicants and coming to a reasonable determination based on the evidence. In that case I found the officer's decision to be reasonable.

[20] Generally, applicants must provide full disclosure in their application for permanent resident status satisfactory to the reviewing immigration officer who is entitled to deference on his or her assessment. In *Asuncion v Canada (Minister of Citizenship & Immigration)*, 2005 FC 1002 Justice Rouleau wrote:

> 18 Kelen J. in Guzman (supra) determined after relying on *Jafari v. Canada (Minister of Employment & Immigration)*, [1995] 2 F.C. 595 (Fed. C.A.), a decision where Strayer J. wrote that he was satisfied that paragraph 117(9)(d) of the *Regulations* was properly enunciated with the administration of Canada's immigration law; that it is reasonable that immigration law would require an applicant for permanent residence to make full disclosure.

However, exceptions do arise and I find this to be the case here.

[21] The difference between that case and this is that the principal applicant in *Sinnathamby* was a mature adult who had been arrested and interrogated by the Sri Lankan navy but later released on a bribe. The officer understood the principal applicant could communicate in English. The applicant in this case was a teenager twice detained and held for ransom. At the time of his initial application,

he was 19, unrepresented, had been left behind by his parents and, based on the CHC's presumably knowledgeable observation, not fluent in English.

[22] The Immigration Officer emphatically states in the final assessment:

> While I can understand some minor confusion in presenting a complicated history, our questions are clear. The Dependent is not a child, he is 22 years old with a reasonable education. I note he engaged a Canadian lawyer to help him with his application in Dec. 2009. Since that time, I am left with more confusion regarding his background. … He now declares to us he has been arrested and detained multiple times in direct contradiction to of earlier declarations. I simply cannot see how this applicant has discharged his statutory duty to show he is not inadmissible.
>
> [emphasis added]

[23] The difficulty with the above summation is that, at the time of the earlier first declaration, the applicant was not 22, was not represented by any agent let alone a lawyer, had been left behind by his parents and was acknowledged by CHC to not be fluent in English. The Officer does not assess whether the applicant as of the time of the first declaration was mature and knowledgeable or, as young men may on occasion be, somewhat oblivious to directions given.

[24] Moreover, the applicant had early on in the process provided his father's PIF which precisely describes the same two detentions he listed in the subsequent application form. The Officer's final review never referred to the applicant's provision of the PIF narrative which clearly sets out the applicant's two detentions although the CAIPS notes disclose the information was available early on.

[25] In *Khan v Canada (Citizenship and Immigration)*, 2008 FC 512 at paragraph 25, Justice O'Keefe wrote:

> Paragraph 40(1)(a) is written very broadly in that it applies to any misrepresentation, whether direct or indirect, relating to a relevant matter that induces or could induce an error in the administration of the Act. I am of the opinion that this Court must respect the wording of the Act and give it the broad interpretation its wording demands. There is nothing in the wording of the paragraph indicating that it should not apply to a situation where a misrepresentation is adopted, but clarified prior to a decision being rendered.

Given that the Immigration Officer's main concern is that the applicant may be a security threat, it seems less relevant that he did not disclose his being held for ransom at the outset.

[26] The use by the Officer of s.11 as a basis for a negative decision is problematic if it is left to a merely subjective assessment. To be reasonable, the Officer must give reasons that are in accord with the information before the Officer and have relevance to the decision the Officer must make.

[27] The Immigration Officer did not turn his mind to whether the applicant's failure to initially declare the two detentions is material to the question of security or inadmissibility. There is no suggestion the father's PIF does not accurately describe the circumstances of their detentions especially given the applicant's parents were accepted in Canada as refugees. The Sri Lankan police security report indicates the applicant has not come to their attention. How is the applicant's detainment for ransom relevant to the security concern first raised?

[28] In *Wang v Canada (MCI)*, 2005 FC 1059 at paragraph 57, Justice O'Keefe considered the clause-by-clause analysis of Bill C-11 (now *IRPA*) document which states:

> This section is similar to provisions of the current act concerning misrepresentation by either permanent or temporary residents but modifies those provisions to enhance enforcement tools designed to eliminate abuse.
>
> [emphasis added]

In my view, the applicant was not attempting to abuse Canadian Immigration procedures.

[29] The Officer refers to other confusion but acknowledges some confusion was understandable.

[30] Given that the Officer harps on the initial failure by the applicant to declare the two detentions without assessing the applicant's circumstances when the omission first occurred, I cannot find the Officer's assessment to be reasonable. Otherwise, any omission in an initial application would qualify as abuse as referred to in *Wang*, above. In my view, the Court has to consider whether the Officer assessed the circumstances of the omission and its materiality of that information.

[31] The applicant has provided information about his arrests and that information is not contradicted in any way by other evidence. The Officer erred in relying on the information about the arrests in coming to the refusal decision. The Officer's use of the applicant's provision of unchallenged information of the arrests as part of the reasons for refusal is unreasonable.

[32] The applicant submitted questions for certification which the respondent opposes. I consider the issue in this matter to be fact related and not of broad significance or general application and I decline to certify any question.

[33] The application for judicial review is granted. The matter is to be referred back for re-determination by a different immigration officer and CHC counsellor and the applicant is to provide such further information as may be required.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The matter is to be referred back for re-determination by different immigration officers and the applicant is to provide such further information as may be required.
3. No general question of importance is certified.

"Leonard S. Mandamin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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