Federal Court  Cour fédérale

Date: 20150414

Docket: IMM-2616-14

Citation: 2015 FC 456

Ottawa, Ontario, April 14, 2015

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

KIRUBAKARAN BALASINGHAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA* or the Act) of a decision of a visa officer, wherein the officer refused the applicant's application for a permanent resident visa. The officer found the applicant inadmissible pursuant to paragraph 34(1)(f) of *IRPA* and found insufficient humanitarian and compassionate (H&C) grounds to overcome his inadmissibility.

II. Facts

[2] The applicant is a citizen of both Sri Lanka and the United Kingdom (UK).

[3] In 2008, he applied from the UK for permanent residence in Canada. His application was refused in 2010, as an immigration officer found that he had been a member of the Liberation Tigers of Tamil Eelam (LTTE) and was inadmissible pursuant to paragraph 34(1)(f) of *IRPA*.

[4] This Court dismissed his application for leave and for judicial review of that decision.

[5] He submitted another application for permanent residence in Canada in August 2011, in which he responded in the negative to a question asking whether he had previously made permanent residence applications and whether any such applications had been refused.

[6] In August 2012, a visa officer sent him a procedural fairness letter with respect to this potential misrepresentation. In response, the applicant's consultant submitted that the erroneous response had been strictly clerical and the result of poor communication between the applicant and an assistant in the consultant's office.

[7] The procedural fairness letter also noted a discrepancy between the information provided in the applicant's previous application that he had helped his brother to help the LTTE, and his negative response to a question in his current application as to whether he had ever "been associated with a group that used, uses, advocated or advocates the use of armed struggle or

violence to reach political, religious or social objectives." The applicant's consultant responded that he had answered "no" to this question because he was never a "member" of any group that advocates armed struggle, such as the LTTE. Rather, the applicant had always maintained that the services he had provided to the LTTE were provided under duress and that he was at no time an associate or member of the group.

[8] In October 2012, the officer sent the applicant another procedural fairness letter, advising him that there were reasonable grounds to believe that he was inadmissible on security grounds pursuant to paragraph 34(1)(f) of *IRPA*.

[9] The applicant's consultant responded that the only evidence of membership was that he had provided support to the LTTE by repairing boat and vehicle engines. He argued that these activities were limited and marginal, and that none of the jurisprudential indicators of membership were present. He also requested H&C relief and ministerial relief in the event he was found inadmissible.

III. The Impugned Decision

[10] On November 7, 2013 the officer determined that the applicant did not meet the requirements for a permanent resident visa as he was inadmissible on security grounds pursuant to paragraph 34(1)(f) of *IRPA*.

[11] The officer noted that the LTTE meets the definition of an organization described in subsection 34(1) of *IRPA* and found that the applicant had been a member thereof, since he had

admitted that he worked for the LTTE as a mechanic and was paid by them for the work he did. She noted that section 33 of *IRPA* calls for "reasonable grounds" to believe, and found that it is "reasonable to believe that persons who provide services for an organization and who derive an economic benefit from their association with that organization are members of that organization". Thus she was satisfied that the applicant had been a member of an organization that had engaged in acts referred to in paragraphs 34(1)(a), (b) and (c).

[12] Further, the officer was not satisfied that there were sufficient H&C factors to overcome the applicant's inadmissibility. The officer was satisfied with the *bona fides* of the relationship between the applicant and his wife, and that the best interests of the children would be served by living with both parents, but found that the children would not suffer undue hardship by being relocated to the UK and that there were not sufficient H&C grounds to overcome the inadmissibility since the applicant is established in the UK and his spouse has previously lived there as well.

[13] Finally, the Officer was not satisfied that the case warranted ministerial relief.

IV. Issues

[14] This matter raises the following issues:

1. Does the doctrine of issue estoppel apply to the issue of the applicant's inadmissibility?

2. Did the officer err in her determination that there were insufficient H&C factors to overcome the applicant's inadmissibility?

V. Standard of Review

[15] These issues are questions of mixed fact and law, subject to review on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Kanapathy v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 459 at para 29 [*Kanapathy*]; *Dhaliwal v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 157 at paras 20-24; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18).

VI. Applicant's Position

[16] The applicant contends that the inadmissibility issue is not barred by the operation of issue estoppel because the officer exercised her discretion to re-hear the applicant on this issue by sending him a fairness letter to address her concerns and then rendering a new decision on the issue, in conformity with *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at paras 61-62 [*Danyluk*].

[17] Rather, the officer's decision replaced the 2010 decision but was unreasonable. The officer failed to analyze the evidence before her with the jurisprudential factors of membership set forth in *Suresh v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 1537, and she should not have made a finding of membership since she found no evidence that the applicant had a shared common purpose or knowledge of the LTTE's acts of terrorism or

subversion (*Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at para 33 [*Poshteh*]).

[18] With respect to the H&C determination, the applicant contends that the officer failed to consider that it is in the children's best interests to be surrounded by extensive family members in addition to parents, which would be the case if they remained in Canada. Further, the officer's consideration that the applicant's spouse and children could live in the UK was irrelevant, since the applicant's spouse has a right to live in Canada as a citizen.

VII. Respondent's Position

[19] The respondent submits that the inadmissibility issue is *res judicata* as the three criteria of issue estoppel are present. Where issue estoppel applies, the Court should only exercise its discretion not to apply it in the rarest of cases where special circumstances warrant such discretion (*Danyluk* at para 63; *Giles v Westminster Savings Credit Union*, 2010 BCCA 282 at para 63 [*Giles v Westminster*]; *Naken v General Motors of Canada Ltd*, [1983] 1 SCR 72 at para 41; *Apotex Inc v Merck & Co*, 2002 FCA 210 at para 48). Such special circumstances have not been shown to exist in this case.

[20] In any event, the officer's conclusion that the applicant is inadmissible to Canada was reasonable. Her conclusion is in conformity with the jurisprudence that the interpretation of the term "member" has to be given an unrestricted and broad interpretation (*Poshteh* at para 27). Informal participation or support for the organization may suffice to satisfy a test for membership (*Kanapathy* at para 34).

[21] Further, the H&C decision was reasonable. The officer considered all the H&C considerations put forward by the applicant. The applicant and his wife's preference that the family be reunited in Canada rather than the UK are clearly insufficient to establish the type of hardship that would warrant overcoming inadmissibility on security grounds.

VIII. Analysis

A. *Does the doctrine of issue estoppel apply to the issue of the applicant's inadmissibility?*

[22] Issue estoppel is a branch of *res judicata* that prevents the re-litigation of issues or facts that have previously been determined. The three preconditions to the operation of the doctrine are as follows: the same question has previously been decided; the prior judicial decision was final; and the parties to both proceedings are the same (*Danyluk* at para 25).

[23] As all three pre-conditions to the operation of issue estoppel were present in this case, I find that the officer erred by not considering the doctrine of issue estoppel with respect to the 2010 decision of the Federal Court. The Federal Court denied leave to the applicant in respect of the 2010 refusal of his permanent residency application pursuant to section 34(1)(f) of *IRPA*, and that decision was a final one (*Shaju v Canada (Minister of Citizenship and Immigration)*, [2005] FCJ No 972).

[24] However, it would not be appropriate to send this matter back for re-determination in the circumstances of this case because the officer could not have come to a different conclusion. While the court has a discretion to relieve against the harsh effects of issue estoppel where the

usual operation of the doctrine would work an injustice (*Danyluk* at para 63; *Schweneke v Ontario*, [2000] OJ No 290 at para 38), it is not clear that an administrative tribunal has the same discretion to override the normal operation of issue estoppel in respect of a prior court decision. In Donald Lange, *The Doctrine of Res Judicata in Canada*, 3d ed (Markham: LexisNexis Canada Inc, 2010) at 118, 225-227, Lange writes that in *Danyluk*, the Supreme Court of Canada held that a court is only required to address the factors for and against the exercise of discretion when considering the application of issue estoppel in a tribunal-to-court context.

[25] Assuming that administrative tribunals have the discretion to override issue estoppel in respect of prior court decisions, this discretion would be even more restricted than the court's discretion to do so, which itself is very limited in application and only occurs in the rarest of cases (*Danyluk* at paras 62, 66; *GM (Canada) v Naken*, [1983] 1 SCR 72 at 101; *Apotex Inc v Merck and Co*, 2002 FCA 210 at paras 45-46, 48). Not only would the officer have had a very limited discretion if at all, but the applicant did not submit any special circumstances that would make it unjust in the circumstances of this case to rely on the 2010 inadmissibility determination. The burden to demonstrate such injustice lies on the party seeking to invoke the discretion (*Schweneke* at para 38; *Giles v Westminster* at para 63).

[26] I find therefore that the 2010 determination of inadmissibility stands and could not be re-litigated by the parties or re-determined by the officer.

B. *Did the officer err in her determination that there were insufficient H&C factors to overcome the applicant's inadmissibility?*

[27] In deciding that there were insufficient H&C grounds to overcome the applicant's inadmissibility, the officer considered and made reference to all of the relevant factors put forward by the applicant, including his work as a baker in the UK, his spouse's wish not to live in the UK due to her love for Canada and her extensive family here, and their two children in Canada. While the officer was satisfied with the *bona fides* of the relationship between the applicant and his wife and was of the view that the best interests of the children would be served by living with both parents, she drew her conclusion on the basis that the children would not suffer undue hardship by being relocated to the UK, that the applicant is established in the UK, and that his spouse has also previously lived there for four years. As such, the officer reasonably concluded that there were not sufficient H&C grounds to overcome the applicant's inadmissibility.

[28] Finally, I note that the ministerial relief issue has been resolved: the officer did not have the jurisdiction to consider this request; her error in doing so had no bearing on the outcome of the above decision; and she has confirmed that the appropriate steps will now be taken to liaise between the applicant and the appropriate unit of the Canada Border Services Agency in respect of the applicant's request for ministerial relief.

[29] For these reasons, the application for judicial review is dismissed. The parties have not proposed any questions for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review is dismissed.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2616-14
STYLE OF CAUSE:	KIRUBAKARAN BALASINGHAM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MARCH 31, 2015
JUDGMENT AND REASONS:	TREMBLAY-LAMER J.
DATED:	APRIL 14, 2015

APPEARANCES:

Mark J. Gruszczynski	FOR THE APPLICANT
Patricia G. Nobl	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mark J. Gruszczynski Barrister and Solicitor Westmount, Québec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT