Federal Court  Cour fédérale

Date: 20181031

Docket: IMM-41-18

Citation: 2018 FC 1096

Ottawa, Ontario, October 31, 2018

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

NANTHAKUMAR KANDIAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

[1] Nanthakumar Kandiah, the Applicant, seeks judicial review of a decision ("Decision") in which his application for a permanent resident visa in Canada was denied on the basis that he was neither a member of the Convention refugee abroad class nor a member of the Humanitarian-protected persons abroad class, notably the country of asylum class, pursuant to section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA") and sections 145 to 147 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

("Regulations"). The Decision was made by an immigration officer ("Officer") of the Consulate General of Canada, Immigration Section, in Bengaluru, India. This application is brought pursuant to subsection 72(1) of the IRPA.

[2] For the reasons that follow, the application will be allowed. The Applicant's right to procedural fairness was breached by the failure of the Officer to interview the Applicant prior to making the Decision despite numerous assurances by Canadian officials that an interview would occur.

I. Background

[3] The Applicant is a Sri Lankan national of Tamil ethnicity. He was born in Jaffna, Sri Lanka, and is 48 years old. The Applicant is married and has three children (two sons, 24 and 9 years old respectively, and a daughter, 21 years old). The Applicant's wife was also born in Jaffna and is of Tamil ethnicity.

[4] The Applicant owned and operated a bus company in Sri Lanka in an area occupied by the Liberation Tamil Tigers of Eelam ("LTTE") during the civil war. The LTTE forced the Applicant to allow the use of his buses for transporting people and goods. The Applicant lost his home and business as a result of the fighting and he and his family were captured by the Sri Lankan army and sent to an internally displaced persons camp. The Applicant, his wife and children fled Sri Lanka in 2009 and were accepted in India as refugees. They have now been living in a refugee camp in India for nine years.

[5] The Applicant's mother and six siblings live in Canada and are Canadian citizens. In February 2010, the Applicant's sister and four other individuals submitted a sponsorship application for the Applicant and his family. On March 17, 2010, Citizenship and Immigration Canada ("CIC") approved the group of five sponsorship undertaking and the Applicant's application for permanent residence was sent to the Canadian mission in New Delhi. In its approval letter, CIC stated that the visa office in New Delhi would arrange to interview the Applicant to determine eligibility and admissibility to Canada. The letter also stated that the average processing time for applications was 29 months.

[6] The completed application submitted by the Applicant does not contain a detailed account of his experiences in Sri Lanka. He refers only to the persecution of Tamils and the fact that he and his family could not seek state protection. The Applicant also states that he and his family suffered great pain in Sri Lanka and continue to suffer in the refugee camp in India.

[7] In the Global Case Management System ("GCMS") notes that form part of the Decision, repeated notations through 2013-2016 refer to the fact that the Applicant's application was in the interview queue. On each of May 20, 2016 and June 30, 2016, following inquiries from the Applicant's Canadian Member of Parliament ("MP"), two notations are made in the GCMS notes, stating that a representative of the MP was informed that no timeframe had yet been scheduled for the interview.

[8] On October 5, 2016, a procedural fairness letter ("Procedural Fairness Letter") was sent to the Applicant stating that the country conditions in Sri Lanka had changed significantly since

he identified his reasons for not returning. Therefore, the Applicant was being provided with an opportunity to inform the visa office if he intended to pursue his application and, if so, to submit any additional information he would like considered, including information relating to his personal circumstances, current country conditions in Sri Lanka and any Humanitarian and Compassionate ("H&C") Considerations.

[9] The Applicant sought and was provided with three extensions of time to file his submissions. The Applicant's counsel provided submissions on behalf of the Applicant on April 28, 2017. The GCMS notes reflect that the submissions were received, added to the file and given to the Officer on May 13, 2017. The submissions focus on the current country conditions in Sri Lanka and the risks inherent in any return to Sri Lanka by the Applicant and his family as Tamil asylum-seekers who had previously been victimized by government authorities. The submissions do not describe the Applicant's experiences in Sri Lanka during the civil war nor do they address the living conditions of the family in India.

[10] The Officer's review of the Applicant's file is dated October 11, 2017 in the GCMS notes. The Officer did not interview the Applicant prior to making the Decision.

II. Decision under Review

[11] The Decision was first communicated to the Applicant by way of letter dated November 22, 2017. In the Decision letter, the Officer informed the Applicant that his application for a permanent resident visa in Canada as a member of the Convention refugee abroad class and as a member of the Humanitarian-protected persons abroad class had been refused. The letter stated

that the Applicant had failed to provide updated information relevant to his application as requested in the Procedural Fairness Letter. As a result, the application was refused based on the information before the Officer.

[12] In contrast, the GCMS notes dated October 11, 2017 ("Officer Review") clearly reference the receipt and review of the submissions from the Applicant's counsel dated April 28, 2017. This error was raised by the Applicant's MP and the visa office conceded that the November 22, 2017 Decision letter cited the wrong reasons for refusal and that a revised letter would be issued. No revised Decision letter was placed before me. The Respondent's written materials do not address this issue but rely on the October 11, 2017 GCMS notes as the Decision under review.

[13] In the GCMS notes, the Officer states that he conducted a comprehensive review of all submissions on file. He notes the family's initial displacement within Sri Lanka in 1995 and the Applicant's submission that they were unable to seek protection from the Sri Lankan authorities as they were suspected by the authorities of being members of the LTTE. The Officer referred to the Applicant's statement that he and his family suffered painfully in the war zone and at the detention camp in India but noted that the Applicant provided no details to personalize or clarify his statement.

[14] The Officer reviewed the country condition information for Sri Lanka, highlighting positive developments since the end of the civil war in 2009. The Officer states that a person's Tamil ethnicity itself would not warrant international refugee protection, nor would a person who evidences past connection to the LTTE warrant such protection unless the individual is perceived

as having a significant role in post-conflict Tamil separation. The Officer also states that the information submitted by the Applicant refers only to general human rights reporting for specific groups at risk in Sri Lanka. The Officer was not satisfied that these general human rights conditions applied to the Applicant's specific circumstances or to those of his family. The Officer could not conclude that "there is a serious possibility or reasonable chance that they have a well-founded fear of persecution, or that they have been or would continue to be seriously and personally affected by civil war, armed conflict or massive violations of human rights", as required for purposes of sections 145 to 147 of the Regulations.

[15] The Officer then assessed whether there were H&C considerations which would justify the Applicant's permanent resident visa application. The Officer engages in a brief assessment of the Applicant's submissions regarding his family's living conditions in the refugee camp in India and states:

> According to the IRB Status of Sri Lankan Tamil refugees in India (2008–January 2010) Sri Lankan refugees may face limitations given that permission from authorities is required to work outside of a refugee camp and that those remaining within the camp must report within set timelines. Although this may present inconveniences, it does not demonstrate that Sri Lankan Refugees are prohibited from employment in India. Likewise, while periodic reporting to authorities may be an inconvenience, it does not restrict an individual's movement or ability to go about their daily life. (Immigration and Refugee Board of Canada, Status of Sri Lankan Tamil refugees in India, including information on identity documents, citizenship, movement, employment, property, education, government aid, camp conditions and repatriation (2008-January 2010).

[16] The Officer conducted no assessment of the best interests of the children of the Applicant. He states only that he was not satisfied that the Applicant's personal circumstances or

those of any of his dependants warranted acceptance of the Applicant's application on H&C grounds.

III. Issues

[17] The Applicant questions the procedural fairness accorded to him and his family in the review of his application for permanent residence in Canada. He also submits that the Decision itself was unreasonable.

[18] I address the issues raised by the Applicant as follows:

1. Were the Applicant's rights to procedural fairness breached: (a) by the failure of the Officer to interview the Applicant prior to making his Decision; or (2) by the error in the Decision letter of November 22, 2017 stating that the Applicant had failed to respond to the Procedural Fairness Letter?

2. Was the Decision reasonable in its assessment of: (1) the Applicant's H&C claim pursuant to subsection 25(1) of the IRPA; or (2) the country condition evidence for Sri Lanka and the Applicant's risk profile?

IV. Standard of review

[19] The issues of procedural fairness raised by the Applicant will be reviewed for correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-56 (*Canadian Pacific*)). The review focuses on the procedures followed in arriving at a decision and not on the substance or merits of the case in question. I must assess whether the process followed by CIC and the Officer in the Applicant's case was just and fair having regard to all of the Applicant's circumstances, the substantive rights at stake and the other contextual factors identified by the Supreme Court of

Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Baker*) (*Canadian Pacific* at para 54):

> [54] A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. I agree with Caldwell J.A.'s observation in *Eagle's Nest* (at para. 21) that, even though there is awkwardness in the use of the terminology, this reviewing exercise is "best reflected in the correctness standard" even though, strictly speaking, no standard of review is being applied.

[20] Turning to the concerns raised by the Applicant as to the substance of the Decision itself, it is well-established that the decision of an officer as to whether an applicant is a member of the Convention refugee abroad class or the country of asylum class is a question of mixed fact and law reviewable on the reasonableness standard (*Gebrewldi v Canada (Citizenship and Immigration)*, 2017 FC 621 at para 14; *Pushparasa v Canada (Citizenship and Immigration)*, 2015 FC 828 at para 19 (*Pushparasa*); *Bakhtiari v Canada (Citizenship and Immigration)*, 2013 FC 1229 at paras 22-23). Consequently, the Officer's Decision is owed deference and will only be set aside if it lacks justification, transparency, or intelligibility, and falls outside the range of possible, acceptable outcomes which are defensible on the particular facts of this case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Analysis

1. *Were the Applicant's rights to procedural fairness breached: (a) by the failure of the Officer to interview the Applicant prior to making his Decision; or (b) by the error in the Decision letter of November 22, 2017 stating that the Applicant had failed to respond to the Procedural Fairness Letter?*

(a) Failure to Interview the Applicant

[21] The Applicant submits that he had a legitimate expectation he would be interviewed as part of the Officer's review of his application. He states that CIC made repeated representations concerning the scheduling of an interview in its communications with the Applicant, his sponsors and his MP. The GCMS notes, which form part of the Decision (*Pushparasa* at para 15) reflect the following series of references to an interview:

- March 2010: Statement in the letter approving his group sponsorship undertaking that the visa office would arrange to interview the Applicant to determine eligibility and admissibility to Canada;
- September 2014: Visa post response to a request from the sponsor for an update on the status of the application, stating that the file was in the queue for interview;
- March 2016: CIC (Montréal) response to a request from the Applicant's MP on the status of the application, stating that the file was in the queue for interview;
- May 2016: CIC (Montréal) response to a request from the Applicant's MP on the status of the application, stating that verification had not started and that the overall time for review had passed but there was no timeframe for an interview; and
- June 2016: CIC (Montréal) response to a request from the Applicant's MP on the status of the application, stating that there was no timeframe for the interview.

[22] The Applicant references the CIC's OP5 Manual (*Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-protected Persons Abroad Classes*) ("OP5 Manual") which highlights the importance of an interview in the review process (OP5 Manual section 10):

> Although legislation does not require that a personal interview be used as the means to determine eligibility, it is difficult to defend a negative determination when the factor assessed is more subjective than objective. For example, refusing persons on the grounds they

> lack the personal qualities to establish themselves without an interview could be hard to defend. In spite of this, there is nothing that prevents a positive determination without an interview. Likewise, when assessing the credibility issues, the paper process could be inadequate. While it is accepted that the written submission could be an adequate substitute for an oral hearing in appropriate circumstances, where a serious question of credibility is involved, fundamental justice could require an oral hearing.

[23] The Respondent submits that the CIC's invitation to the Applicant in the Procedural Fairness Letter to make further written submissions satisfied the demands of procedural fairness. The Applicant was given three extensions of time to respond to the Procedural Fairness Letter and in none of the correspondence regarding the extensions did he take issue with the change in the manner by which procedural fairness would be met. Further, the Respondent notes that the Applicant's April 2017 submissions in response to the Procedural Fairness Letter did not include a request for an interview. The Respondent also submits that the OP5 Manual is not binding and, in any event, states that interviews are not mandatory where the application in question is complete and there is sufficient information to determine eligibility.

[24] In assessing the fairness of the process followed by CIC and the Officer, I must have regard to the substantive rights of the Applicant at issue in the case and the other contextual factors from *Baker*. The first, second, third and fifth contextual factors identified by the SCC in *Baker* (at paras 23-25, 27) and applied to this case take into account the nature of the Decision being made (administrative or quasi-judicial), the content of the process established by CIC and the statutory scheme for making it, and the importance of the Decision to the Applicant. Without question, the substantive rights of the Applicant and his family at stake in the determination by the Officer of their application for a permanent resident visa are fundamental to their lives. The

Decision is critically important to each member of the family. Consequently, the Officer was required to follow carefully the process established by CIC. Any variation in the process, particularly one directly affecting the Applicant's ability to make his case, had to be communicated to the Applicant in the clearest terms.

[25] The fourth *Baker* factor is that of the legitimate expectation of the individual (*Baker* at para 26). The principle of legitimate expectation derives from the requirements of procedural fairness. If a public entity or official has, by its conduct, led an individual to expect that a process would be conducted in a certain manner, the Court will protect the individual's expectation. The principle is procedural only. It does not create substantive rights in the individual nor does it guarantee a specific result (*Furey v Conception Bay Centre Roman Catholic School Board*, 1993 CarswellNfld 116 at para 32; *Canada (Minister of Citizenship and Immigration) v Dela Fuente*, 2006 FCA 186 at para 9 (*Dela Fuente*)). In 2013, the SCC described the principle of legitimate expectation and its role in assessing the content of procedural fairness in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraph 94:

> [94] The particular face of procedural fairness at issue in this appeal is the doctrine of legitimate expectations. This doctrine was given a strong foundation in Canadian administrative law in Baker, in which it was held to be a factor to be applied in determining what is required by the common law duty of fairness. If a public authority has made representations about the procedure it will follow in making a particular decision or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.

[26] I find that the Applicant's legitimate expectation that he would be interviewed was unfairly denied by the Respondent and the Applicant's right to procedural fairness breached. From March 2010 to June 2016, the Applicant, his sponsors and his counsel reasonably assumed that the Applicant would be interviewed by the Officer prior to a decision regarding his application. They relied on the clear and repeated representations of CIC to this effect. The Applicant then received the Procedural Fairness Letter in October 2016 requesting updated submissions regarding his personal circumstances, current country conditions in Sri Lanka and any H&C considerations. The Procedural Fairness Letter contained no indication that the Applicant's written submissions were requested in lieu of an interview. It did not state or suggest that CIC was changing the review process it had established and communicated to the Applicant. It may well be that the Officer genuinely assumed that this change was implicit in the Procedural Fairness Letter. To the Applicant, it was not.

[27] The Respondent submits that an administrative process can be changed as long as the change to the process is fair and is properly communicated. I agree with the Respondent. However, I find that insufficient notice of the change in process was given to the Applicant.

[28] It is important to first note that the Applicant was not promised consultation as suggested by the Respondent, he was promised an interview. The promise was repeated numerous times over many years and was the reason given by CIC for the long delays in the processing of the visa application. The Procedural Fairness Letter did not state that a decision had been made to replace the interview with an opportunity to file written submissions. The clarity relied on by the Respondent to fairly change the process was absent from the letter.

[29] The Applicant continued to expect that he would be afforded an interview. In my opinion, in light of the passage of six years since the application was submitted, it was reasonable for the Applicant to assume that the request for updated written materials in the Procedural Fairness Letter was in addition to the promised interview. The Applicant's argument that this assumption coloured the content of the April 2017 submissions is persuasive. The submissions were premised on the fact that the Applicant would address his personal circumstances and H&C considerations in the interview, leaving the written submissions made by his counsel to focus on the assembly and analysis of the relevant country condition evidence.

[30] In addition to the representations made to the Applicant by CIC, the OP5 Manual strongly suggests that the Applicant's case is not one that could be adequately determined through a paper screening process. While the OP5 Manual does not impose a mandatory requirement to interview all applicants, it does contemplate that applications involving a subjective assessment likely require an interview of the applicant. In my view, the fact that the Applicant and his family continued to live in a refugee camp in India eight years after the end of the civil war in Sri Lanka indicates that the Applicant and his family had a subjective fear of returning to Sri Lanka. This case is one in which "it is difficult to defend a negative determination when the factor assessed is more subjective than objective" (OP5 Manual section 10).

[31] As Justice Rennie concluded in *Canadian Pacific* (at para 56), in assessing whether a process was fair, "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond". In the present case, the Applicant knew the case he was to

meet. However, he relied on the representations of Canadian officials that he would have an opportunity to speak to his personal circumstances during an interview. The Procedural Fairness Letter did not contradict this expectation. The lack of notice to the Applicant of the proposed change to the review process is determinative in this application for judicial review. The Applicant was not given a full and fair chance to respond to the concerns of the Officer. The Applicant's application for a permanent resident visa in Canada must be remitted for redetermination by another immigration officer after an interview of the Applicant is scheduled and held.

(b) Erroneous Decision Letter

[32] The Decision letter is dated November 22, 2017. As noted above, the letter incorrectly stated that the Applicant's April 2017 submissions in response to the Procedural Fairness Letter had not been received. Therefore, the Decision was made without regard to those submissions. It was not until January 31, 2018 that the GCMS notes were forwarded to the Applicant. The GCMS notes correctly reflect the receipt of the April 2017 submissions.

[33] The Decision letter was not a mere cover letter as characterized by the Respondent. It was a formal decision issued by the Officer that was patently wrong. The Applicant was left with an incomprehensible result for two months. While the error did not cause actual prejudice to the Applicant as the April 2017 submissions were considered by the Officer, it caused confusion and weakened the Applicant's confidence in the application process. In the absence of prejudice, this error alone would not lead me to conclude that the Applicant's right to procedural fairness had been breached and that the Applicant's case must be reconsidered. I raise the error because it

compounded the lack of procedural fairness accorded the Applicant. Not only was the Applicant shocked to receive a decision regarding his application without having been interviewed, he was also presented with a decision that contained an obvious and substantive error.

2. Was the Decision reasonable in its assessment of (a) the Applicant's H&C claim pursuant to subsection 25(1) of the IRPA or (b) the country condition evidence for Sri Lanka and the Applicant's risk profile?

[34] It is unnecessary to review whether the Decision was reasonable as this application for judicial review will be allowed and the Applicant's application reconsidered due to the Officer's failure to interview the Applicant. The immigration officer who redetermines the case will do so after interviewing the Applicant in accordance with this judgment. The officer will assess whether H&C considerations justify a subsection 25(1) exemption of the Applicant or his family members from the requirements of the IRPA based on the new information. Further, it is impossible to know the risk profile that would have emerged if the Applicant had been interviewed. The officer will be required to review the current country conditions in Sri Lanka against the additional information provided by the Applicant in the interview and the resulting cumulative risk profile of the Applicant and his family members.

[35] I would note the following. The Officer's H&C analysis in the Decision was cursory. The Respondent submits that the lack of detail in the Applicant's application regarding his family's personal experiences in Sri Lanka and in India necessarily resulted in a brief examination of what little information was before the Officer. He submits that, in an H&C application, the onus lies with the applicant to explain the basis of the application (citing *Zafra v Canada (Citizenship and Immigration)*, 2018 FC 420 at para 18). I agree with the Respondent but only to a point.

[36] The Officer confined his review of H&C factors to whether or not the Applicant and his family were able to freely access work, school and travel in India. The Officer found that the family faced no more than an inconvenience in accessing these services and concluded that the Applicant had not established his case for an H&C exemption. The Officer did not address the length of the family's stay in the refugee camp in India and the lack of permanence inherent in their situation, nor did the Officer assess the best interests of the children. There was no reference to the Applicant's family in Canada. This information was obvious from the admittedly sparse record and should have been addressed. I recognize that two of the Applicant's children are now adults but his youngest son is only nine years old.

[37] It is well-established that an officer considering an exemption under subsection 25(1) of the IRPA is required to consider the best interests of any children concerned. In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (*Kanthasamy*), the SCC stated (at paras 38-39):

> [38] Even before it was expressly included in s. 25(1), this Court in *Baker* identified the "best interests" principle as an "important" part of the evaluation of humanitarian and compassionate grounds. As this Court said in *Baker*:
>
> > . . . attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for [an H&C] decision to be made in a reasonable manner. . . .
> >
> > . . . for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying [an H&C] claim even

> when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable. [paras. 74-75]
>
> [39] A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered: *Baker*, at para. 75. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 323 F.T.R. 181, at paras. 9-12.

[38] The GCMS notes make no mention of the best interests of the child. Even on the evidentiary record before the Officer, the Decision was not reasonable. On redetermination, all aspects of the Applicant's H&C claim, including the best interests of the remaining minor child, must be considered.

VI. Conclusion

[39] I have found that the Applicant's right to procedural fairness was breached as he had a legitimate expectation that he would be interviewed by the Officer. The failure to interview the Applicant requires a redetermination of the Applicant's permanent resident visa application. As part of the redetermination, the Applicant must be afforded an interview to allow him the opportunity to fully present his case. In light of the delays experienced by the Applicant and his family, the interview and redetermination should be undertaken on a priority basis.

[40] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT in IMM-41-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision of the immigration officer is set aside and the matter remitted. An interview of the Applicant is to be conducted prior to redetermination of the Applicant's application for permanent residence by a different officer, all on a priority basis.

3. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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