

Federal Court



Cour fédérale

Date: 20181219

Docket: IMM-2334-18

Citation: 2018 FC 1278

Ottawa, Ontario, December 19, 2018

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

SANTHAKUMAR AIYATHURAI

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 by the Applicant, brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision made by the Refugee and Protection Division [RPD] dated April 24, 2018, which rejected the Applicant's refugee claim [Decision].

II. Facts

[2] The Applicant is a Tamil citizen of Sri Lanka, born May 23, 1969. He deposed to being born and raised in the Northern Jaffna District, former stronghold of the Liberation Tigers of Tamil Eelam [LTTE]. He deposed he fled Sri Lanka in April 2012 with the assistance of an agent/human smuggler and arrived to the US on April 11, 2012 before making his way to Canada on June 6, 2012 to claim refugee status.

[3] The Applicant filed his Personal Information Form [PIF] with the RPD on July 5, 2012. At the time, he was represented by a licensed paralegal. Roughly six years after filing his PIF and having heard nothing in the interim, he was convoked for a hearing before the RPD on March 23, 2018. A pastor acted as his representative at the hearing.

[4] The RPD delivered an oral decision from the bench that rejected his refugee claim, finding that the Applicant's testimony raised "several significant credibility concerns." That said, the RPD accepted as credible his evidence of identity, nationality, ethnicity, and particular social group.

[5] The pastor did not file any written material in support of the Applicant's claim, and filed nothing in relation to country conditions in Sri Lanka. The pastor did not ask questions in response to those asked by the RPD (technically called redirect). The pastor did not make any real final oral submissions, nor file such submissions in writing.

III. Issue

[6] In my view, the Applicant raises one determinative issue namely whether the Applicant's right to a fair hearing was breached by the manifestly incompetent representation of the Applicant by the pastor in the circumstances of this case.

IV. Standard of review

[7] The right to a fair hearing is a question of procedural fairness. Questions of procedural fairness are reviewed on the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. That said, I note that in *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at para 69, the Federal Court of Appeal indicated that a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But more recently, see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69.

[8] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

V. Analysis

[9] At issue in this claim is whether the Applicant's right to a fair hearing was breached by the representation of the Applicant by the pastor in the circumstances of this case. The Applicant submits, and I agree that while there is no absolute right to counsel, there is a right to a fair proceeding. The Applicant therefore asks if the hearing was fair: *Costeniuc v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1495, per O'Reilly J [*Costeniuc*]; *Austria v Canada (Minister of Citizenship and Immigration)*, 2006 FC 423, per Tremblay-Lamer J; *Mervilus v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1206 [*Mervilus*].

[10] Notably, in *Costeniuc*, O'Reilly J made the following comment applicable to this case:

[16] Therefore, Mr Costeniuc is entitled to a new hearing. While he had no absolute right to counsel, he had an undeniable right to a fair hearing. Looking at the proceedings as a whole, I am satisfied he was denied that right.

[11] In my respectful view, the hearing in the case at bar was not fair.

[12] While the Applicant was represented by a pastor, a review of the record persuades me that the pastor's "representation" amounted to no representation at all. It is suggested the Court treat the Applicant as a self-represented litigant and I was inclined to agree, except here the situation was, if possible, worse in that the Applicant thought he had a representative but in fact he did not.

[13] As noted, the pastor did not file any written material in support of the Applicant's refugee claim. The "representative" filed nothing in relation to country conditions in Sri Lanka, the country to which the Applicant would be returned if the RPD dismissed his refugee application. The pastor did not ask questions in response to those asked by the RPD; in technical terms there was no redirect by the Applicant. Each of these processes was clearly available to the Applicant, but the pastor failed to take advantage of any of them.

[14] A reading of the hearing transcript indicates the pastor, when asked if he had any final submissions to make, in fact instead embarked upon a recitation of his own history of coming to Canada from Sri Lanka which was inappropriate. The "representative" then started to give evidence from his own experience on the situation in Sri Lanka, before the panel terminated that line of likewise inappropriate submissions. Consequentially, in my assessment, the Applicant was deprived of all the processes designed to ensure a fair proceeding available to those claiming refugee status.

[15] It was submitted that the RPD was also at fault. I do not need to make a finding in this regard given my conclusion that this case did not turn on bad strategy, bad advice, or bad choices by the representative, but rather the total failure by the representative.

[16] I note that in *Costeniuc*, the applicant was denied a fair hearing when he had not spoken to counsel, had not seen the 300-page record, believed counsel would be present to represent him, and was not alerted of counsel's absence. The applicant had no representative. And in *Mervilus*, a breach of procedural fairness occurred when the applicant found out the day before

the hearing that he would not be represented, he could not express himself correctly or organize his presentation, and did not have the evidence he gave his counsel. Again, the applicant had no representative. In my view, the case at bar falls on the same side of the line as *Costeniuc* and *Mervilus*. For reasons beyond his control, and for all practical purposes the Applicant, while he might have thought otherwise, in fact had no representative.

VI. Conclusion

[17] With respect, procedural fairness was breached. The Applicant did not have the fair hearing to which he was entitled. Therefore, the Decision must be set aside.

VII. Certified question

[18] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-2334-18

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, the matter is remitted to a different decision-maker for redetermination, no question is certified, and there is no order as to costs.

“Henry S. Brown”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2334-18

STYLE OF CAUSE: SANTHAKUMAR AIYATHURAI v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 4, 2018

JUDGMENT AND REASONS: BROWN J.

DATED: DECEMBER 19, 2018

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