

Federal Court



Cour fédérale

Date: 20101004

Docket: IMM-5902-09

Citation: 2010 FC 985

Toronto, Ontario, October 4, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

SUPPIAH THARMAVARATHAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Tharmavarathan (the Applicant), a Tamil man from Sri Lanka, applied for judicial review of a decision by an Immigration Officer refusing his application for permanent residence in Canada. The Officer refused the application on the basis that the Applicant was excluded under subsection 34(1) of the *Immigration and Refugee Protection Act*, S.C.2001, c. 27 (*IRPA*), as he believed that the Applicant had been a supporter or a member of a terrorist organization, the Liberation Tigers of Tamil Eelam (LTTE).

[2] The Respondent relies in good measure on the CAIPS notes for its assertion that the Officer had a basis for a reasonable belief the Applicant had been a member of LTTE. However, the Respondent did not include an affidavit of the Officer attesting to the truth of the content of the CAIPS notes.

[3] I grant this judicial review because the CAIPS notes alone cannot be relied upon for the truth of their contents, and the evidence in the Applicant's mother's personal information form (PIF) was insufficient for the Officer to have reasonable grounds for believing the Applicant was a member of the LTTE.

Background

[4] The Applicant is a citizen of Sri Lanka who identifies as Tamil. His mother successfully immigrated to Canada and applied to sponsor the Applicant and his other two siblings.

[5] The Officer conducted several interviews with the Applicant. The first one was held on June 16, 2006 to determine whether the Applicant fell within the dependent child category. A second interview was held on July 19, 2006. A third was held on June 22, 2009 where the Officer informed the Applicant that there were concerns about his background, based on some of the statements made by the Applicant's mother in her PIF.

Decision Under Review

[6] On September 23, 2009, the Officer rejected the Applicant's application for a permanent resident visa on the basis that there were reasonable grounds to believe that the Applicant was inadmissible on grounds of security under subsection 34(1) of *IRPA*.

[7] The Officer noted inconsistencies in what the Applicant had said during the several interviews, in particular whether the Applicant had ever worked for the LTTE:

I asked you to explain why you had worked for the LTTE gathering firewood, cooking for them, and doing computer work for them. You now denied ever doing these things. It was also noted that in the interim, your sister had been interviewed and refused. This appears to have made you reconsider what you initially said. You admitted that your sister had worked for them in a trusted position. Your mother had claimed the entire family has worked for the LTTE in one form or another. If you did not work for the LTTE under duress or otherwise you clearly appear to have associated with LTTE supporters as your family have clearly worked for them and often in positions of trust.

[8] The Officer also noted that the Applicant seemed to blame his father's death on the Sri Lankan Army (SLA), "despite the fact that the supposed attack on your father does not match up with the time of your father's death or the nature of his death. This appears to betray a sympathy for the LTTE and a hatred of the SLA."

[9] The Officer found that the Applicant's complete denial of what he had previously said diminished the Applicant's credibility and supported the belief that the Applicant was a supporter or

even a member of the LTTE. As such, the Officer believed the Applicant to be inadmissible and refused his application.

[10] In deciding that the Applicant was completely lacking in credibility, the Officer relied extensively on the interviews with the Applicant as set out in the CAIPS notes. The Officer did not provide an affidavit setting out the events leading to the recording of the CAIPS notes or otherwise verifying the statements of fact contained therein.

Legislation

[11] The relevant provisions of the *Immigration and Refugee Protection Act*, S.C.2001, c. 27 (IRPA) are:

<p>34(1) A permanent resident or a foreign national is inadmissible on security grounds for</p> <p>(a) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;</p> <p>(b) engaging in or instigating the subversion by force of any government;</p> <p>(c) engaging in terrorism;</p> <p>(d) being a danger to the security of Canada;</p> <p>(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or</p> <p>(f) being a member of an organization that there are reasonable grounds to believe</p>	<p>34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :</p> <p>a) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;</p> <p>b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;</p> <p>c) se livrer au terrorisme;</p> <p>d) constituer un danger pour la sécurité du Canada;</p> <p>e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;</p> <p>f) être membre d'une organisation dont il y a des motifs raisonnables de croire</p>
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engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).

qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).

Standard of Review

[12] Issues of membership in a terrorist organization are mixed questions of fact and law:

Kozonguizi v. Canada (Minister of Citizenship and Immigration), 2010 FC 308, *Chwach v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1036 at para.13.

[13] The Respondent submits that a high level of deference is due to the Officer's decision because of the national security aspect of section 32. He submits that the decision must be "obviously unreasonable" to be reviewable, a term he takes from *Moiseev v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 88 (*Moiseev*).

[14] I do not believe *Moiseev* introduced a new standard of review. A decision that is unjustifiable, opaque and unintelligible is obviously unreasonable and the Supreme Court's direction on the meaning of reasonableness in *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para. 59 is more than sufficient for the purpose of review.

Issues

[15] The principal issue is whether there is evidence of the fact of membership upon which the Officer could reasonably conclude the Applicant was a member of the LTTE. A related and

determinative issue in this proceeding relates to the evidentiary status of the CAIPS notes. Thus, the issues are:

- a. What status do the CAIPS notes have as evidence?
- b. Did the Officer err in finding that the Applicant was a member in a terrorist organization?

Analysis

What status do the CAIPS notes have as evidence?

[16] Despite relying extensively on the CAIPS notes in their memoranda of argument, the Respondent had not filed an affidavit to support its assertions based on the CAIPS notes.

[17] CAIPS notes are those entered by an immigration officer in a computer record and are no different from notes an officer might make in handwritten form. The Federal Court of Appeal considered the evidentiary status of a visa officer's memoranda in *Wang v. Canada (Minister of Citizenship and Immigration)*, (1991) 12 Imm. L.R. (2d) 178 at 183 where it stated:

The second matter is fundamental. It is, in substance, an appeal against the order excluding the visa officer's memorandum from evidence. The Respondent argues that, because of the inconvenience of arranging depositions by visa officers who, by definition, are outside Canada, the Court ought to accept their notes and memoranda as proof of the truth of their contents even though no affidavit averring to that truth is filed. In this, as in some of the other appeals dealt with serially, the visa officer concerned produced notes made during the interview and/or a memorandum made considerably later setting forth his recollection. These were produced as exhibits to the affidavit of an immigration officer in Canada who had reviewed the pertinent file and selected material considered relevant to the proceeding in Court.

I see no justification for deviating from evidentiary norms in these circumstances. No legal basis for acceding to the Respondent's argument has been demonstrated and, in my opinion, it is devoid of a practical basis. In the first place, unless the error said to vitiate the decision appears on the face of the record, the intended immigrant also, by definition, outside Canada must depose to his or her evidence and, unlike the visa officer, may not be conveniently located to do so. There is no justice in according one witness to the proceeding an opportunity to present evidence in a manner that precludes it being tested by cross-examination. In the second place, the suggestion of administrative inconvenience seems flimsily based. Given that visa officers normally inhabit premises in which may be found other functionaries before whom affidavits acceptable in Canadian courts may be sworn, there seems no practical reason why his or her version of the truth cannot, with equal convenience, be produced in affidavit as in memorandum form. Finally, should a disappointed applicant wish to inconvenience a visa officer by a cross-examination there is the sanction that the right will have to be exercised, at least initially, at some considerable expense to the applicant.

[18] The Applicant submits that the alleged facts pertaining to the Applicant's responses in interviews recorded in the CAIPS notes are not in evidence. He refers to the Court's discussion on the topic of the admissibility of CAIPS notes without an affidavit in *Chou v. Canada (Minister of Citizenship and Immigration)*, [2000] 190 F.T.R 78, 3 Imm L.R. (3d) 212. (*Chou*). In *Chou*, 13, Justice Reed found at para:

I accept, then, that the CAIPS notes should be under review. However, the underlying facts on which they rely must be independently proven. In the absence of a visa officer's affidavit attesting to the truth of what he or admitted as part of the record, that is, as reasons for the decision she recorded as having been said at the interview, the notes have no status as evidence of such.

[19] I find the CAIPS notes may not be relied on for the truth of their contents since they are not introduced by an affidavit from the Officer. While they may show the Court how the Officer reasoned through his decision, they are not part of the factual evidentiary record.

Did the Officer err in finding that the Applicant was a member in a terrorist organization?

[20] With respect to the proper interpretation of the term “member”, I found in *Kozonguizi* that the term should be given a broad and unrestricted meaning. This conclusion followed the jurisprudence in *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 and *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1457. This is to say that the person at issue need not be a card-carrying member of a terrorist or subversive group, or even commit violent acts on their behalf to fall within the ambit of this section of *IRPA*.

[21] The standard of proof on the question of membership is “reasonable grounds to believe” which is described as less than the civil standard of a balance of probabilities and more than mere suspicion: *Mugasera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para. 114 (*Mugasera*).

[22] The Officer’s reasoning itself rests in the main on the inconsistencies in the Applicant’s statements as contained in the CAIPS notes. Had the Respondent provided me with an affidavit introducing the CAIPS notes, I might have been able to continue my analysis of the Officer’s findings. But, under the circumstances, all I have before me are assertions made in reliance on the CAIPS notes which are allegations of fact but not evidence.

[23] Further, the alleged facts tipping the scale against the Applicant, namely the allegation of his skirting around the questions about the LTTE, are solely contained in the CAIPS notes which are not admissible evidence of the facts alleged.

[24] In this case, the Officer became aware of the possibility that the Applicant may have been involved with the LTTE based on the information in his mother's PIF. This included the mother's assertion that everyone in the family worked for the LTTE because they had to.

[25] The following are the excerpts from the mother's PIF which could be construed to infer there was some relationship between the Applicant and the LTTE:

... The LTTE forced all the people in the area to help them. My husband was forced to do heavy labour. I was made to do cooking and cleaning. The LTTE also demanded 50 parcels of food every week. We were also forced to give money. Over time I had to give 4 sovereigns and a considerable amount of money. ...

In 1995, LTTE demanded we allow at least one of our children to join them. We paid RS 150,000 to save our children. We promised to consider their demand once our children completed their studies....

The army considered Mathagal to be an LTTE stronghold and the people of the area to be strong LTTE supporters. My children were severely questioned and accused of helping the LTTE....

In 2000 my eldest daughter entered University. The army were [*sic*] suspicious of LTTE activity and came to our house several times to question. Due to this situation my daughter went to live at the University Dorms....

In June 2002 the Tigers contacted my son and I and told us we had to work in their office. They wanted my son to do work with their computers (he was studying computers) and they wanted me to do general help. We did not want to work for the LTTE.

[26] These paragraphs do not tell us if the Applicant actually worked for the LTTE but there certainly is enough to entertain a suspicion the Applicant may have worked for the LTTE.

[27] All I may consider is the Officer's reasoning with respect to the mother's PIF. The only conclusion I can reach is that the mother's PIF was certainly enough to create a suspicion of membership, but not enough to constitute reasonable grounds for believing the Applicant was a member of the LTTE.

[28] The evidence in the mother's PIF does not provide a sufficient basis for the Officer to reasonably come to the conclusion that the applicant voluntarily worked for the LTTE or even at all. The Officer's inferences may not be reasonably drawn from the statements in the Applicant's mother's PIF. A finding of membership in the LTTE is not supported if one considers the Applicant's involvement, the length of time he was involved, the degree of commitment to the organization and its objectives from the facts set out in the mother's PIF, which shows the Applicant to have been involved at the most, if at all, in doing minor tasks under compulsion for the LTTE.

[29] In result, I find on the evidence, the Officer's decision to refuse the application for permanent residence status on the basis that the Applicant was excluded under subsection 34(1) of the *Immigration and Refugee Protection Act*, S.C.2001, c. 27 (*IRPA*) because the Applicant had been a supporter or a member of a terrorist organization, the LTTE, to be unreasonable.

Conclusion

[30] I grant the application for judicial review.

[31] The Parties have not proposed a question of general importance and I certify none.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted.
2. No question of general importance is certified.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5902-09

STYLE OF CAUSE: SUPPIAH THARMAVARATHAN and THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JULY 20, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** MANDAMIN, J.

DATED: OCTOBER 4, 2010

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