Federal Court  Cour fédérale

Date: 20110407

Docket: IMM-4892-10

Citation: 2011 FC 438

Vancouver, British Columbia, April 7, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

PAKEERATHAN THAMOTHARAMPILLAI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Lord Denning once said:

> We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side. Sometimes the error has seriously affected the course of the evidence, in which case we can at best order a new trial [*Doyle v Olby (Ironmongers) Ltd*, [1969] 2 All ER 119 at page 121].

So it is in this case. What went wrong is that the immigration consultant Mr. Thamotharampillai hired to make representations with respect to a Pre-Removal Risk Assessment (PRRA) failed to make any submissions at all.

[2] Mr. Thamotharampillai is a Tamil from Sri Lanka. He is inadmissible to Canada for serious criminality arising from a conviction here for possession of a narcotic for the purposes of trafficking. He was sentenced to a term of imprisonment of at least two years. In accordance with section 112(3) of the *Immigration and Refugee Protection Act* (IRPA), he was thus disentitled to seek refugee protection. He was, however, entitled to and demanded a PRRA, not as a failed refugee, but rather as a person in need of international protection under section 97 of IRPA. The issue is whether, on the balance of probabilities, he would be subjected to a danger, believed on substantial grounds to exist, of torture or to a risk to his life or to a risk of cruel and unusual treatment or punishment in Sri Lanka.

[3] In this assessment, he was only entitled to present new evidence, as that term is defined in IRPA. Since he had been here for some time, in December 2009 the Canadian Border Service Agency delivered to him a package containing current country information. He was given a delay to file representations, arguments and to submit evidence.

[4] As he had been using an immigration consultant throughout the process, a consultant who may have passed himself off as a lawyer, Mr. Thamotharampillai instructed him to make appropriate submissions and to submit further evidence in the form of other country reports.

[5] The consultant did absolutely nothing. It is not surprising therefore that the assessment was negative. The Minister's Delegate found that the civil war in Sri Lanka had ended and that country conditions had so changed that Mr. Thamotharampillai, despite his subjective fear, was not objectively at risk of torture, or at risk to his life or at risk of cruel and unusual treatment or punishment were he to return to Sri Lanka.

[6] In this judicial review of that decision Mr. Thamotharampillai raises a number of issues. However, it is only necessary to consider one. In my opinion, he was denied natural justice because he was represented by an incompetent immigration consultant. Had the consultant been competent and done his duty, the decision may well have been different.

[7] Mr. Thamotharampillai had the option of representing himself (not always a good idea) or engaging an "authorized representative." In accordance with sections 2 and 13.1(1) of the *Immigration and Refugee Protection Regulations* an "authorized representative" is a lawyer, notary or a member of the Canadian Society of Immigration Consultants. Mr. Thamotharampillai's representative is a member of that latter organization, which enjoys special status. For some purposes, it is a federal board or tribunal, as explained in *Onuschak v Canadian Society of Immigration*, 2009 FC 1135, 357 FTR 22.

[8] Among other things, the Society has disciplinary powers. Mr. Thamotharampillai has filed a complaint with respect to his immigration consultant's behaviour. That complaint is still outstanding.

[9] In order to succeed in this judicial review, the applicant must establish the facts on which the claim of incompetence is based, that the consultant was incompetent, and that the incompetence resulted in a miscarriage of justice (*Robles v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 374, 2 Admin LR (4th) 315, and *Hallatt v Canada*, 2004 FCA 104, [2004] 2 CTC 313).

[10] The first two elements are not in issue. The fact of the matter is that the immigration consultant failed to carry out his instructions to file representations. The only question is whether this incompetence resulted in a miscarriage of justice. It is common ground that it is not enough to submit that a competent consultant would have filed further representations. The issue is whether those representations would have had any effect on the Minister's Delegate's decision.
Mr. Thamotharampillai submits that the onus upon him has been discharged if he has made out a fairly arguable case. The Minister submits there has to be a reasonable probability that this material would have made a difference.

[11] There is a distinction to be drawn between malfeasance and nonfeasance. As a general rule, a party is bound by the actions of his or her agent. However, there are times when a lawyer or authorized representative has failed to mail a completed humanitarian and compassionate application, or has failed to inform the Board of the applicant's change of address. This is a different category all together, and the category which is applicable in this instance. A number of the cases are reviewed in *Chukwudebe v Canada (Minister of Citizenship and Immigration)*, 2009 FC 211, 79 Imm LR (3d) 298.

[12] Mr. Thamotharampillai's point is that had his consultant done what he should have done, he would certainly have drawn the following country documentation to the decision maker's attention, as he has to this Court:

a. Amnesty International, "Unlock the Camps in Sri Lanka: Safety and Dignity for the displaced now – A Briefing Paper" (10 August 2009) ASA 37/016/2009;

b. United Nations High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka" (5 July 2010) HRC/EG/SLK/10/03;

c. Australia: Refugee Review Tribunal, Sri Lanka (3 April 2009);

d. Australia: Refugee Review Tribunal, Sri Lanka (31 August 2006);

e. International Crisis Group, "War Crimes in Sri Lanka" (17 May 2010) Asia Report N° 191;

f. Human Rights Watch, "Legal Limbo: The Uncertain Fate of Detained LTTE Suspects in Sri Lanka" (2 February 2010);

g. Amnesty International, "Sri Lanka urged to ensure safety of detained former asylum-seekers" (3 September 2010);

h. United States Department of State, "2009 Country Reports on Human Rights Practices – Sri Lanka" (11 March 2010);

i. Amnesty International, "Australia asylum suspension could harm world's most vulnerable" (9 April 2010);

j. Immigration and Refugee Board of Canada, "Sri Lanka: Liberation Tigers of Tamil Eelam (LTTE) activity in Sri Lanka, including arrests, whether LTTE members have been responsible for extortion, disappearances or bombings since the government defeated the LTTE, and whether the LTTE has the capacity to regroup within Sri Lanka (May 2009 – January 2010)" (28 January 2010);

k. International Crisis Group, "Sri Lanka: A Bitter Peace" (11 January 2010) Asia Briefing N° 99; and

l. Amnesty International, "Arrest of Sri Lankan opposition leader escalates post-election repression" (9 February 2010).

[13] I cannot agree with the Minister's balance of probabilities submission. Certainly if one fails to file a statement of defence in an action or to appear in an application in time, it is incumbent to show that there may be some merit in the position that should have been advanced earlier. The burden is to establish a fairly arguable case, not to establish on the balance of probabilities that one would be successful. Furthermore, the consideration of country conditions and the weight to be given to various reports lies within the province of the Minister's Delegate, whose decision is not to be set aside on judicial review unless unreasonable.

[14] There is a rebuttable presumption that the Minister's Delegate has considered the entire record. In this case, it would appear that the delegate not only considered the material he sent to Mr. Thamotharampillai, but also subsequent reports. It seems to me that if I give weight to the evidence which would have been before him had the consultant done his duty, other to find that the material raises a fairly arguable case, I would be stepping beyond the confines of a judicial review.

[15] Mr. Thamotharampillai's counsel has certainly pointed out some material which could well have made a difference. The applicant had been suspected of having links with the Tamil Tigers, which may put him at risk as reported in Human Rights Watch, "Legal Limbo: The Uncertain Fate of Detained LTTE Suspects in Sri Lanka" (2 February 2010). In United Nations High Commissioner for Refugees, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka" (5 July 2010) HRC/EG/SLK/10/03, it is said:

> In light of the foregoing, persons suspected of having links with the LTTE may be at risk on the grounds of membership of a particular social group. Claims by persons suspected of having links with the LTTE may, however, give rise to the need to examine possible exclusion from refugee status.

[16] Although this is not a case of procedural unfairness, since no criticism whatsoever can be levied at the decision maker, procedural unfairness is only one aspect of natural justice. We are entitled to have a fair opportunity to make our case, or our defence, before an unbiased decision maker. The *audi alterem partem* aspect of natural justice requires that Mr. Thamotharampillai have a fair opportunity to fully present his case.

[17] Although Mr. Justice Le Dain was speaking of procedural fairness, I think the following passage from the Supreme Court's decision in *Cardinal v Kent Institution*, [1985] 2 SCR 643, 24 DLR (4th) 44, at paragraph 23, is *à propos*:

> […] The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

[18] Findings of fact with respect to country conditions fall within the jurisdiction of the Minister's Delegate, not the Court. I will not speculate as to what the result would have been had the material placed before me been placed before him, other than to find that the material establishes a fairly arguable case.

CERTIFIED QUESTION

[19] Counsel for the Minister submits that I should certify the following serious question of general importance in order to support an appeal:

> Where, in the context of a risk assessment, counsel fails to provide further documentation or supplementary submissions in response to the disclosure of updated country condition documents, must an

> applicant establish a reasonable probability that the result would have been different but for counsel's failure in order to demonstrate a reviewable error based on the incompetence of counsel?

[20] Much is made of the fact that Mr. Thamotharampillai had been given until 4 January 2010 to make further submissions and to present new evidence. The Human Rights Watch and the UNHCR reports, referred to above, post-date that delay, but pre-date the PRRA decision which was delivered on 14 July 2010. Thus, no matter how competent the counsel, the material relied upon could not have been submitted.

[21] There are two answers to these submissions. The first is competent counsel should bring to the attention of a decision maker relevant material which has been issued after a hearing but before the decision was made. The second is that the Minister's Delegate himself also reviewed material published subsequent to the delay he had given Mr. Thamotharampillai. In particular, he states that he reviewed an UHNCR article dated 27 April 1010. In fact, this gave rise to the second ground for judicial review, *i.e.* that Mr. Thamotharampillai had not been given an opportunity to respond. This raises the dilemma posed by *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461, [1998] FCJ No 565 (QL) (FCA). On the one hand, if a federal tribunal is to rely on extrinsic evidence an opportunity must be given to the applicant to respond thereto. On the other hand, it is permissible for a decision maker to rely upon documents from public sources in relation to general country conditions which need not be disclosed unless they are novel and significant and evidence changes that may affect the decision. The point I wish to make, however, is that in this particular case, having unilaterally decided to consider new material, the Minister's Delegate could hardly have denied Mr. Thamotharampillai the opportunity to submit post-hearing material.

[22] In *Canada (Minister of Citizenship and Immigration) v Liyanagamage* (1994), 176 NR 4, [1994] FCJ No 1637 (QL), Mr. Justice Décary, speaking for the Court of Appeal, stated that in order to be certified a question must not only be determinative of an appeal, but also transcend the interests of the immediate parties to the litigation and contemplate issues of broad significance or general application.

[23] In my opinion, this case is too fact-specific to support a certified question. The miscarriage of justice was that in this particular case the decision maker was bound to consider the material competent counsel would have submitted before the decision was rendered. There is a fairly arguable case to be made that based on such a record the decision may well have been different. That is the miscarriage of justice in this particular case. It is not necessary to establish on the balance of probabilities that the result would have been different.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The judicial review is granted.

2. The decision is quashed and the matter is remitted to a different Minister's Delegate for redetermination.

3. There is no serious question of general importance to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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