Federal Court  Cour fédérale

Date: 20111014

Docket: IMM-453-11

Citation: 2011 FC 1166

Ottawa, Ontario, October 14, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

LACHHMAN DASS DHANDAY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review of a decision of the Immigration Officer, Eric Verner (the officer), at the High Commission of Canada in New Delhi, India, dated December 23, 2010, determining that Mr. Lachhman Dass Dhanday (the applicant) does not meet the requirements for a permanent resident visa because there are reasonable grounds to believe that he is a member of

the inadmissible class of persons described in subsection 35(1)*(a)* of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The officer also found that the applicant is inadmissible under subsection 36(2)*(b)* of the *IRPA* on grounds of criminality for committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament.

[3] For the reasons that follow, this application for judicial review is dismissed.

II. Facts

[4] The applicant is an assistant sub-inspector for the Punjab Police Force in the Province of Punjab, India where he started to work as a constable in 1973.

[5] The applicant applied for a permanent resident visa in the family class and was sponsored by one of his children who presently lives in Canada.

[6] The applicant was interviewed by the officer on December 8, 2010.

[7] During the interview, the officer questioned the applicant on his duties as a police officer and the manner in which these were carried out.

[8] The Computer-Assisted Immigration Processing System notes (CAIPS notes) indicated that the applicant denied at first having used any form of coercion during the interrogation of suspects. Then, the officer questioned the applicant whether he knew about the methods used by the Central Intelligence Agency [CIA] to obtain information from suspects. When asked if he ever applied such methods to interrogate suspects, the applicant said “I used methods that don’t leave any marks, shake them, suffocate them, hit them but carefully not to leave any marks”. He then confirmed having used the log techniques “but wrapped in a cloth so it does not leave any marks”.

[9] The officer then questioned him on the legality of these interrogation methods. The applicant replied that “it was to obtain justice”. When asked by the officer if he regretted having used such methods, the applicant stated that “we only used those methods when we were 100% sure that the suspects had done the crime. These people had done crime and had to be punished”. The officer continued his questioning and stated that there are court systems to punish or convict those who have committed crimes, the applicant answered “yes, but these people had been brutal and if we don’t do it, how can we control crime”.

[10] The officer concluded that the acts committed during his career as a police officer in India constitute an offence under sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 [*CAHWCA*]. He also concluded that the acts acknowledged by the applicant are defined as acts of torture under section 269.1(1) of the Canadian *Criminal Code*, RSC, 1985, c C-46. Consequently the officer wrote in his decision that the applicant was a member of an inadmissible class of persons under both subsection 35(1) *(a)* and subsection 36(2) *(b)* of the *IRPA*.

III. Legislation

[11] The applicable legislation is appended to this decision.

IV. Issues and Standard of Review

A. Issues

1. Did the officer breach his duty of procedural fairness?

2. Did the officer err in determining that the applicant was also inadmissible under subsection 36(2)(b) of the IRPA?

B. Standard of Review

[12] Issues raised in respect of procedural fairness are reviewable on the standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 55 and 79; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43).

[13] The issue of determining whether an individual belongs to a certain class under the *IRPA* is reviewable on a standard of reasonableness (*Abdilahi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1173, [2005] FCJ No 1431 at para 6; *Mugu v Canada (Minister of Citizenship and Immigration)*, 2009 FC 384, [2009] FCJ 457 at para 34).

V. Parties' submissions

A. Applicant's submissions

[14] The applicant acknowledges that he used multiple forms of coercion to obtain information from suspects while on duty as a police officer. Nevertheless, he submits that he was never asked nor did he answer questions on the said admissions.

[15] The applicant also claims that considering the serious consequences of being inadmissible on grounds defined in subsection 35(1)*(a)* of the *IRPA*, the officer should have brought his concerns to the applicant's attention and provide him with the opportunity of responding to these concerns.

[16] The applicant submits that a simple signature by the applicant informing the officer he understood his concerns would have sufficed to ensure procedural fairness.

[17] As for the refusal under subsection 36(2)*(b)* of the *IRPA*, the applicant claims that the officer did not have any evidence before him that the manner in which force was used while interrogating suspects in India constituted an offence in both India and Canada as required by the *IRPA*. The applicant therefore takes the position that this omission constitutes a reviewable error in law based on a standard of correctness.

B. Respondent's submissions

[18] The respondent claims that contrary to what is alleged in the applicant's memorandum, the respondent does not have the burden of proving a ground of inadmissibility. Section 11 of the *IRPA* is clear on this issue.

[19] According to the respondent, the applicant bears the burden of proving that there was a breach of procedural fairness and that the CAIPS notes were flawed. As Justice Tremblay-Lamer writes in *Wang v Canada (Minister of Citizenship and Immigration)*, 2003 FC 833, [2003] FCJ No 1083 at para 24, "it still remains that in matters of judicial review, the burden is on the applicant to show that the tribunal has not complied with procedural fairness or has not acted fairly or reasonably". The respondent submits that the applicant has failed to discharge himself of this burden. The applicant needed to adduce evidence to demonstrate that he was not properly informed of the officer's concerns.

[20] The respondent further submits that the Minister has the right to implement the procedure he deems the most adequate to deal with visa applications in a fair manner (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817).

[21] On the issue whether the applicant was also inadmissible pursuant to subsection 36(2)*(b)* of the *IRPA*, the respondent submits that the officer's conclusion on this question has no bearing on the first finding that the applicant is inadmissible under subsection 35(1)*(a)* of the *IRPA*. Accordingly the respondent takes the position that this alleged error does not invalidate the conclusion that the

applicant is inadmissible and cannot obtain a permanent resident visa in Canada under subsection 35(1)(*a*).

VI. Analysis

1. Did the officer breach his duty of procedural fairness?

[22] It is clear from the facts that the applicant had several opportunities to answer the officer's concerns about the manner in which he discharged his duties as a police officer. The applicant has not adduced any evidence to demonstrate that the officer breached his duty of procedural fairness. In reviewing the CAIPS notes it is clear to this Court that the officer was not attempting to trap the applicant; he was straightforward and open.

[23] The CAIPS notes are part of the officer's decision (see *Ziaei v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1169, [2007] FCJ No 1520 at para 21). The interview lasted 1 hour and 45 minutes further to which the officer wrote "I expressed my concerns to the applicant and gave him a chance to explain himself". The officer also informed the applicant that his admission to have used torture or third degree methods and his justification that these were used to obtain confessions were unacceptable. A close reading of the notes leads this Court to conclude that the applicant was well aware of the officer's concerns. The admissions therein contained were also sufficient to conclude that the applicant was inadmissible under subsection 35(1)*(a)* of the *IRPA.*

[24] This Court acknowledges that "the Minister has the right to choose the procedure it deems the most adequate to deal with visa applications in a fair manner" as long as such procedure does not breach the rules of natural justice. The requirement that the applicant execute a certificate of understanding will not necessarily guarantee procedural fairness. But in this case it is clear that the applicant was provided with the opportunity of explaining himself thoroughly during the interview. The Court cannot find any breach of the principles of procedural equity.

2. Did the officer err in determining that the applicant was also inadmissible under subsection 36(2)(b) of the IRPA?

[25] The officer erred in determining that the applicant was criminally inadmissible under subsection 36(2)*(b)* of the *IRPA*. The officer applied the wrong test when he writes in his decision that "paragraph 36(2)*(b)* of the *IRPA* provides in part that a foreign national is inadmissible on grounds of criminality for committing an act that, if committed in Canada, would constitute an indictable offence under an Act of parliament". In this instance the officer erred, since there was no evidence before him that the equivalent offence would constitute a crime in India or that the applicant had been indicted in India of such an offence (*Zeon v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1338, [2005] FCJ No 1633 at paras 8 and 10).

[26] However, the Court must underline that this error does not invalidate the officer's finding in respect of subsection 35(1)*(a)* of the *IRPA*.

[27] It is clear from the applicant's admissions that he could be found inadmissible on grounds of violating human or international rights for the usage of torture to extract statements from suspects

during his career as a police officer in India. The applicant's admissions could lead to accusations of having committed a crime against humanity and consequently found guilty of an indictable offence under sections 6(1)*(b)* and 6(3) of the *CAHWCA*. The officer's decision based on subsection 35(1) *(a)* is reasonable under the circumstances since it is based on the applicant's own admissions.

VII. Conclusion

[28] The Application for judicial review is therefore dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question of general interest to certify.

"André F.J. Scott"

Judge

ANNEX

***Immigration and Refugee Protection Act*, SC 2001, c 27**	***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27**
Application before entering Canada	Visa et documents
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
If sponsor does not meet requirements	Cas de la demande parrainée
(2) The officer may not issue a visa or other document to a foreign national whose sponsor does not meet the sponsorship requirements of this Act.	(2) Ils ne peuvent être délivrés à l'étranger dont le répondant ne se conforme pas aux exigences applicables au parrainage.
Human or international rights violations	Atteinte aux droits humains ou internationaux
35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for	**35.** (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :
(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;	a*)* commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;
(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*; or	b*)* occuper un poste de rang supérieur — au sens du règlement — au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des violations graves ou répétées des droits de la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*;

(c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association.	c*)* être, sauf s'agissant du résident permanent, une personne dont l'entrée ou le séjour au Canada est limité au titre d'une décision, d'une résolution ou d'une mesure d'une organisation internationale d'États ou une association d'États dont le Canada est membre et qui impose des sanctions à l'égard d'un pays contre lequel le Canada a imposé — ou s'est engagé à imposer — des sanctions de concert avec cette organisation ou association.
Exception	Exception
(2) Paragraphs (1)*(b)* and *(c)* do not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	(2) Les faits visés aux alinéas (1)b*)* et c*)* n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.
Serious criminality	Grande criminalité
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	*a)* être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	*b)* être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under	*c)* commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement

an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	maximal d'au moins dix ans.
Criminality	Criminalité
(2) A foreign national is inadmissible on grounds of criminality for	(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;	*a)* être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;
(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;	*b)* être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;
(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or	*c)* commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;
(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.	*d)* commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.
Application	Application
(3) The following provisions govern subsections (1) and (2):	(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :
(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;	*a)* l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a pardon has been granted and has not ceased to have effect or been revoked under the *Criminal Records Act*, or in respect of which there has been a final determination of an acquittal;	*b)* la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquittement rendu en dernier ressort ou de réhabilitation — sauf cas de révocation ou de nullité — au titre de la *Loi sur le casier judiciaire*;
(c) the matters referred to in paragraphs (1)*(b)* and *(c)* and (2)*(b)* and *(c)* do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;	*c)* les faits visés aux alinéas (1)*b)* ou *c)* et (2)*b)* ou *c)* n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;
(d) a determination of whether a permanent resident has committed an act described in paragraph (1)*(c)* must be based on a balance of probabilities; and	*d*) la preuve du fait visé à l'alinéa (1)*c)* est, s'agissant du résident permanent, fondée sur la prépondérance des probabilités;
(e) inadmissibility under subsections (1) and (2) may not be based on an offence designated as a contravention under the *Contraventions Act* or an offence for which the permanent resident or foreign national is found guilty under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985 or the *Youth Criminal Justice Act*.	*e)* l'interdiction de territoire ne peut être fondée sur une infraction qualifiée de contravention en vertu de la *Loi sur les contraventions* ni sur une infraction dont le résident permanent ou l'étranger est déclaré coupable sous le régime de la *Loi sur les jeunes contrevenants*, chapitre Y-1 des Lois révisées du Canada (1985), ou de la *Loi sur le système de justice pénale pour les adolescents*.
***Crimes Against Humanity and War Crimes Act*, SC 2000, c 24**	***Loi sur les crimes contre l'humanité et les crimes de guerre*, LC 2000, ch 24**
Genocide, etc., committed outside Canada	Génocide, crime contre l'humanité, etc., commis à l'étranger
6. (1) Every person who, either before or after the coming into force of this section, commits outside Canada	**6.** (1) Quiconque commet à l'étranger une des infractions ci-après, avant ou après l'entrée en vigueur du présent article, est coupable d'un acte criminel et peut être poursuivi pour cette infraction aux termes de l'article 8 :

(a) genocide, *(b)* a crime against humanity, or *(c)* a war crime, is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8. …	*a)* génocide; *b)* crime contre l'humanité; *c)* crime de guerre. […]
Definitions (3) The definitions in this subsection apply in this section. "war crime" means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.	Définitions (3) Les définitions qui suivent s'appliquent au présent article. « crime de guerre » Fait — acte ou omission — commis au cours d'un conflit armé et constituant, au moment et au lieu de la perpétration, un crime de guerre selon le droit international coutumier ou le droit international conventionnel applicables à ces conflits, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.
Criminal Code, RSC, 1985, c C-46 Torture **269.1** (1) Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. Definitions (2) For the purposes of this section, […] "torture" means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person	**Code criminel, LRC (1985), ch C-46** Torture **269.1** (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans le fonctionnaire qui — ou la personne qui, avec le consentement exprès ou tacite d'un fonctionnaire ou à sa demande — torture une autre personne. Définitions (2) Les définitions qui suivent s'appliquent au présent article. […] « torture » Acte, commis par action ou omission, par lequel une douleur ou des souffrances aiguës, physiques ou mentales, sont intentionnellement infligées à une personne :

(a) for a purpose including	*a)* soit afin notamment :
*(*i*)* obtaining from the person or from a third person information or a statement,	*(*i*)* d'obtenir d'elle ou d'une tierce personne des renseignements ou une déclaration,
*(*ii*)* punishing the person for an act that the person or a third person has committed or is suspected of having committed, and	*(*ii*)* de la punir d'un acte qu'elle ou une tierce personne a commis ou est soupçonnée d'avoir commis,
*(*iii*)* intimidating or coercing the person or a third person, or	*(*iii*)* de l'intimider ou de faire pression sur elle ou d'intimider une tierce personne ou de faire pression sur celle-ci;
(b) for any reason based on discrimination of any kind,	*b)* soit pour tout autre motif fondé sur quelque forme de discrimination que ce soit.
but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions.	La torture ne s'entend toutefois pas d'actes qui résultent uniquement de sanctions légitimes, qui sont inhérents à celles-ci ou occasionnés par elles.

FEDERAL COURT

SOLICITORS OF RECORD

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