Federal Court Cour fédérale

Date: 20111128

Docket: IMM-2211-11

Citation: 2011 FC 1371

Ottawa, Ontario, November 28, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

VIJAYATHEEPAN JEEVARATNAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application was initially brought by Vijayatheepan Jeevaratnam, a citizen of Sri Lanka, and his five Canadian sponsors. The Applicants seek to set aside a decision of a visa officer at the Canadian High Commission in New Delhi by which Mr. Jeevaratnam's claim to protection as a member of the Convention Refugee abroad class was denied. The impugned decision was based on the visa officer's finding that Mr. Jeevaratnam was not in need of protection.

[2] Mr. Jeevaratnam challenges the decision as unreasonable. He also asserts a breach of the duty of fairness in connection with the visa officer's failure to consider certain corroborating documents allegedly mailed on his behalf to the visa post. The Respondent disputes these arguments and also argues that the sponsoring Applicants have no standing to bring the application and should, therefore, be struck as parties. In the result the Respondent asserts that the application was brought beyond the 60-day requirement based on a belief that Mr. Jeevaratnam was likely notified of the visa officer's decision on an earlier date than the date stated in the Notice of Application.

The Procedural Issues

[3] The Respondent contends that only Mr. Jeevaratnam has standing to prosecute this application and that the other named Applicants, as his Canadian sponsors, should be removed as parties from the proceeding. Ordinarily this result would be of no significance to the application which would still proceed to be resolved on the merits. But here, the Respondent contends that the application may be out of time because the Notice of Application simply asserts that the "applicants" were notified of the decision on February 3, 2011. According to the Respondent, this calls into question the date on which Mr. Jeevaratnam was notified of the decision and casts doubt about whether the Applicants filed the application within 60 days of Mr. Jeevaratnam receiving the notice.

[4] I agree with the Respondent that persons who sponsor a refugee claimant have no standing to be joined as applicants in a judicial review such as this one: see *Douze v Canada (MCI),* 2010

FC 1337 at paras 14-19, [2010] FCJ no 1680 (QL). Therefore, those Applicants are struck as parties from this proceeding.

[5] I do not, however, accept that the application has been shown to be out of time. The Notice of Application is regular on its face and the supporting affidavit of Suventhirakumar Lingaratnam states that the Applicants received notice of the decision on February 3, 2011. Counsel for the Respondent argues that it is "unclear" when Mr. Jeevaratnam received notice of the decision. Mr. Lingaratnam was not cross-examined on his affidavit and I am not in a position to infer from the evidence before me that Mr. Jeevaratnam received notice of the decision on some earlier date than the one stated.

The Fairness Issue

[6] Mr. Boulakia argues that the Certified Tribunal Record (CTR) is incomplete. From this, he asserts that the visa officer misplaced materials that the Applicants claimed to have sent to the visa post and that they were consequently overlooked. In essence, he says that the CTR is unreliable and that an inference ought to be drawn that the "missing" documents were sent and received and later lost. This is an issue that must be reviewed on the basis of correctness.

[7] I do not accept that the CTR is incomplete. The CAIPS notes indicate that certain materials were returned to Mr. Jeevaratnam and it is not apparent from the record that anything else is missing. What I am left with is the bare assertion that the Applicants sent the missing documents in a larger package to the visa post. According to the authorities, that type of evidence is generally insufficient to prove that documents were actually sent to a decision-maker: see *Khatra v Canada*

(MCI), 2010 FC 1027 at para 6, [2010] FCJ no 1291. On the evidence before me, I am not satisfied that the allegedly missing documents were actually sent to the visa post.

[8] Mr. Boulakia argues, nevertheless, that the visa officer owed a duty of fairness to Mr. Jeevaratnam as an unrepresented party to specifically record every document that was received in order to guard against this type of problem. That failure, he says, represents a breach of the duty of fairness. While I accept that it is a prudent administrative practice for decision-makers to exhaustively record the materials received and reviewed, I do not agree that this practice is required for purposes of achieving procedural fairness. It is open to both parties to a document transfer to list what was sent and what was received. The fact that Mr. Jeevaratnam was unrepresented and failed to adequately protect his interests is no reason to impose a heightened fairness obligation on the visa officer. This fairness argument is, therefore, rejected.

The Substantive Issues

[9] In defending the visa officer's decision, Mr. Bechard made a compelling argument for a decision that could have been written and he points to several inconsistencies in Mr. Jeevaratnam's evidence. The visa officer appropriately raised some of those inconsistencies during her interview of Mr. Jeevaratnam but did not explore others. Mr. Bechard is correct that Mr. Jeevaratnam's evidence had enough problems to justify the rejection of his claim. But the credibility issues that the visa officer identified in her interview were not substantially relied upon to support the conclusion that Mr. Jeevaratnam was not a person in need of protection. Instead, the decision primarily rested on a foundation of plausibility findings that are unsustainable and unreasonable.

[10] The principal event that Mr. Jeevaratnam relied upon to establish risk concerned an allegation that his brother had been murdered by Sri Lankan agents who had actually targeted Mr. Jeevaratnam. According to Mr. Jeevaratnam, his brother's murder was a case of mistaken identity. When the authorities learned that they had killed the wrong person, they resumed their search for Mr. Jeevaratnam. These events caused him to relocate and eventually to leave Sri Lanka.

[11] Mr. Jeevaratnam claimed that the Sri Lankan army was motivated to kill him because he was perceived to be a supporter of the Liberation Tigers of Tamil Eelam (LTTE). That perception had led to his arrest and an eight-month detention that only ended with the assistance of a lawyer and with the payment of a bribe by his father.

[12] The visa officer found this story to be implausible and expressed her concerns as follows:

> Your account of the death of your brother does not credibly demonstrate the basis for a well-founded fear of persecution. It is not credible that the army would detain you for eight months and then release you upon payment of a bribe if you were considered a member of the LTTE. Nor is it credible that the army or related groups would then return to your home to kill you one month after your release from detention, or that these assailants would leave after killing your brother without further pursuing you.
>
> Certified Tribunal Record at pp 2-3.

[13] The essential problem with this finding is that this part of Mr. Jeevaratnam's story was entirely plausible, at least insofar as he had recounted it. Contrary to the visa officer's conclusion, Mr. Jeevaratnam did not suggest that he was perceived to be a member of the LTTE but, rather, as a supporter. At the time of these events, when unlawful detentions and extra-judicial killings were frequent, there is nothing implausible about a prisoner gaining release on payment of a bribe and

then being targeted for execution. Indeed, an expectation of rational behaviour on the part of state agents allegedly involved in bribery and murder should not form the basis of a plausibility finding of this sort.

[14] This decision is further weakened by the visa officer's failure to address the evidence of the murder of Mr. Jeevaratnam's brother. This event was at the core of his claim to protection. Mr. Jeevaratnam also corroborated the murder with documentary evidence. It is difficult to contemplate a reasonable denial of Mr. Jeevaratnam's claim in the absence of clear findings about whether the murder happened and about who may have been responsible.

[15] There is at least one other plausibility finding that cannot be sustained. The visa officer noted in Mr. Jeevaratnam's evidence that other members of his family had not been persecuted by the army or related groups since his departure. The visa officer found that it was not credible that Mr. Jeevaratnam's family would not have been pursued by the authorities by virtue of their interest in him. This conclusion is wholly unjustified. It was Mr. Jeevaratnam who claimed to be at risk as a perceived supporter of the LTTE and there was no reason for the authorities to pursue his extended family once he had left Sri Lanka. In any event, it is a dangerous practice to draw inferences on the strength of things that did not happen, particularly in the context of a civil war.

[16] For the foregoing reasons, this decision is unreasonable and must be set aside.

[17] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT'S JUDGMENT is that the Applicants, Selvachandiran Tharmarajah, Ranjit Selvarajah, Gunanithy Jeegatheswaran, Sathithanantham Kandiah and Suventhirakumar Lingaratnam are struck as parties from this proceeding.

THIS COURT'S FURTHER JUDGMENT is that this application for judicial review is allowed with the matter to be redetermined on the merits by a different decision-maker.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2211-11
STYLE OF CAUSE:	JEEVARATNAM v MCI
PLACE OF HEARING:	Toronto, ON
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DATED:	November 28, 2011

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