Federal Court  Cour fédérale

Date: 20131209

Docket: IMM-2412-13

Citation: 2013 FC 1225

Ottawa, Ontario, December 9, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

RICHARD LUCIAN PATHINATHAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision rendered by the Refugee Protection Division [RPD] on February 21, 2013 finding that Richard Lucian Pathinathar is neither a "refugee" within the meaning of section 96 of the IRPA nor a "person in need of protection" under paragraphs 97(1)(*a*) and (*b*) of the IRPA.

II. Facts

[2] The Applicant is a 28-year-old citizen of Sri Lanka of Tamil ethnicity and Catholic faith.

[3] The foundation for the Applicant's claim was that, as a young Sri Lankan Tamil Catholic from the Northern Province, he had faced treatment that rose to the level of persecution from the Sri Lankan Army [SLA] and from the paramilitary group Eelam People's Democratic Party [EPDP], and that he will face similar treatment or be killed should he return to his home country.

[4] He claimed that as a young Tamil from the Northern Province he is at risk of persecution (section 96), and that he faces a risk to his life or a risk of cruel and unusual treatment or punishment in Sri Lanka because paramilitary groups are seeking to kill him for not having fully paid some extortion money (section 97(1)(*b*)).

[5] The Applicant alleged before the RPD that he has been the victim of many privations, that he has been arrested, and that he has been stopped, interrogated and assaulted by the SLA on several occasions during war times, that his family had to relocate, and that his brother was abducted in 2006 by Tamil militants never to be heard from again. The Applicant also claimed having been abducted in August 2010 by a Tamil militant and forced to pay 75,000 rupees to secure his release.

[6] The Applicant left Sri Lanka in October 2010 and arrived in the United States [US] on November 16, 2010 where he was arrested and detained. He was later released on bond and decided to come to Canada where he claimed refugee status on January 1, 2011.

[7] The hearing before the RPD took place on October 29, 2012. At the end of the hearing, the RPD granted the Applicant one month to obtain documents from the American Immigration authorities. The hearing was adjourned before the Applicant's counsel – Fred Saikali, an immigration consultant – could make his final submissions.

[8] On December 7, 2012, the Applicant's immigration consultant submitted to the RPD the documents he obtained from the Applicant's counsel in the US – which did not include the documents requested by the RPD – along with a letter stating that his client does not have the means to obtain any other documents but is willing to sign a release to the Canadian Borders Services Agency so that it might obtain the information directly from the US government. The Applicant's immigration consultant ended the letter by stating that his client "will be waiting [for] the Member's decision in this matter."

[9] On December 10, 2012, the RPD decided that the hearing was to resume on February 26, 2013. On February 20, 2013, however, the RPD sent a fax to the Applicant's immigration consultant informing him that the hearing scheduled for February 26, 2013 was cancelled.

[10] The RPD rendered its decision on February 21, 2013.

III. Decision under review

[11] The RPD was satisfied as to the identity of the Applicant.

[12] The RPD ultimately rejected the Applicant's claim that he is a "Convention refugee" under section 96 of the IRPA and a "person in need of protection" within the meaning of paragraphs 97(1)(*a)* and (*b*) mainly because it took issue with the Applicant's credibility. The RPD also considered the claim on its merits but nevertheless rejected it.

[13] For several reasons, the RPD did not believe, on a balance of probability, that the Applicant's story was true. It noted numerous omissions and inconsistencies in his testimony and in his Port of Entry [POE] declaration and interview and in his Personal Information Form [PIF] narrative. The Applicant testified that he was abducted by the EPDP, but when he was questioned as to the identity of his alleged abductors during his POE interview he answered that he did not know to which paramilitary group they belonged. The Applicant was questioned on this issue during the hearing and claimed that he was nervous during the POE interview. The RPD came to the conclusion that had the Applicant really forgotten the names, he would not have said "I don't know" but would have said something along the lines of "I do not remember."

[14] The RPD also noted that in his POE interview the Applicant was asked whether any of his brothers and sisters were abducted by the Liberation Tigers of Tamil Eelam [LTTE], to which the Applicant answered no. In his PIF, however, he claims that his brother was abducted in 2006 and has never been seen again. Questioned on this issue at the hearing, the Applicant said that he had forgotten, but the RPD rejected this explanation, finding that the loss of a sibling is not likely something one forgets.

[15] The RPD was also of the opinion that, on a balance of probabilities, the Applicant had not been living in Sri Lanka beginning sometime after 2006. In its reasons, it noted that the Applicant had – prior to a coffee break which appeared very helpful to his memory – very limited general knowledge about the area and the events that occurred in the area, including elections. The Applicant was unable to locate his hometown on a map and to give details regarding the progress of the civil war other than the fact that it started in 2006. The RPD also highlighted the fact that the Applicant stated in his POE declaration and interview that he feared the LTTE but that he could not name any of the paramilitary groups. Building on its experience with Sri Lankan claimants, the RPD found on a balance of probability that anyone who had been living in northern Sri Lanka would know that the LTTE is no longer a threat and would likely know some of the names of the various paramilitary groups.

[16] Furthermore, the Applicant provided very little corroborative evidence for the RPD to take into consideration; he even failed to produce a photocopy of his Sri Lankan passport. Also, the Applicant could have handed in his US claim form and more particularly his Credible Fear Hearing interview transcript, but he had not obtained them from the American government. The RPD even gave the Applicant one month to obtain this documentation from the US government, but he claimed to have no means to obtain additional documents, a statement which the RPD found hard to believe given that he had legal representation in Canada and, at some point, in the US. The RPD therefore found that the Applicant failed to meet his obligation under section 7 of the *Refugee Protection Division Rules* (SOR/2012-256), namely to provide acceptable documents.

[17] The RPD took further issue with the fact that the Applicant, who had counsel in the US at the time, chose to enter Canada while awaiting a court date with an Immigration Judge in the US, even though, on a balance of probability, his counsel would have told him that the US asylum process is very fast and that the acceptance rate was 96% at the time. Ultimately, the RPD found that the Applicant was probably not so much looking for protection as he was seeking to secure residence in Canada.

[18] After rejecting the Applicant's claims based on credibility issues, the RPD indicated that if these allegations were to be accepted as credible, the application would nonetheless be rejected. Based on documentation, the RPD concluded that the Applicant's risk from the EPDP arises from a generalized risk in his area which targets people who have money, a group that jurisprudence does not recognize as a "social group" under section 96 of the IRPA.

[19] The RPD finally concluded by stating that the Applicant failed to meet his burden of establishing that his allegations are true, that the United Nations amended its guidance to indicate that Sri Lankans originating from the Northern Province are no longer in need of international protection under the refugee criteria, and that the Applicant would not face any risk as a failed and returning asylum seeker should he return to Sri Lanka as there have been thousands of people before him in the same situation.

IV. Applicant's submissions

[20] The Applicant argues that the RPD committed a serious error which amounts to a breach of natural justice when it cancelled the second hearing, set for February 26, 2013, thereby depriving

the Applicant's immigration consultant of the possibility of addressing the submitted material and of making his final submissions. The Applicant submits that this error constitutes a violation of natural justice and, more specifically, of his right to an oral hearing, as found in case law.

[21] The Applicant adds that the RPD did not give reasons justifying its decision to cancel the second hearing and, consequently, to not accept the immigration consultant's submissions.

[22] As a secondary argument, the Applicant claims that his immigration consultant acted independently of his instructions, due to his incompetence, and that this amounts to a further violation of natural justice regarding the Applicant's right to counsel. He claims never to have instructed his immigration consultant to inform the RPD that he was unable to obtain further documents from the US government. He further adds that he has a limited ability in English and that he did not fully understand the contents of the letter sent by his US counsel stating that the Applicant himself must take the necessary measures to secure the documents from the US government.

V. Respondent's submissions

[23] The Respondent argues that there has been no breach of procedural fairness in the present matter, concerning both the decision to cancel the second hearing and the alleged incompetence of the Applicant's immigration consultant.

[24] First, with regard to the decision of the RPD to cancel the hearing scheduled for February 26, 2013, the Respondent argues that the impugned decision was taken after having

received communication from the Applicant's immigration consultant stating that his client (the Applicant) "will be waiting [for] the Member's decision in this matter." As counsel's conduct cannot be separated from that of his client, the RPD was entitled to assume that this letter was a clear indication from the Applicant, through his immigration consultant, to the RPD that he had no intention of returning to the hearing room to present submissions. The second hearing, thereby rendered useless, was cancelled.

[25] Second, as for the Applicant's argument concerning the incompetence of his immigration consultant, the Respondent claims that the Applicant failed to meet the applicable three-pronged test set out in case law. According to this test, for a representative's conduct to amount to a breach of procedural fairness, the Applicant must establish three elements:

1. The representative's alleged acts or omissions constituted incompetence;

2. The Applicant was prejudiced by the alleged conduct; and,

3. There was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different.

[26] The Respondent submits that the Applicant has produced no evidence to the effect that his immigration consultant's acts constituted incompetence and that, what is more, he has failed to establish that such incompetence has entailed a prejudice on his part and a miscarriage of justice.

[27] Moreover, the Respondent argues that the RPD's decision clearly shows that the documents submitted by the Applicant were taken into consideration. However, the RPD reasonably noted that

the Applicant did nothing to obtain the requested documents from the US government, even though his counsel in the US had indicated to him that he would have to be the one to do it. The onus was on the Applicant to produce adequate documentation to the RPD, which he did not do.

VI. Applicant's supplementary affidavit and additional exhibits

[28] The Applicant submitted a supplementary affidavit which serves two purposes. First, the Applicant presents to this Court an official complaint filed on October 7, 2013 to the Immigration Consultants of Canada Regulatory Council against his immigration consultant. This complaint relies largely on the arguments submitted in the Applicant's original submissions. Second, the Applicant wishes to bring to the attention of this Court a positive determination of the RPD dated July 12, 2012 which dealt with the existence of a risk for Tamil males in Sri Lanka.

VII. Respondent's supplementary memorandum of arguments

[29] Building upon its original submissions, the Respondent produced supplementary arguments in support of its claims.

[30] The Respondent reiterates that the Applicant did not demonstrate that the actions of his former immigration consultant amounted to incompetence, and that these actions have caused him a prejudice and led to a miscarriage of justice. The Applicant, who failed to personally obtain the US documents requested by the RPD, did not show that he would have been able to secure said documents had it not been for the incompetence of his immigration consultant. Furthermore, the Applicant does not provide any argument which he could have presented in his submissions to the RPD that would address the significant credibility findings listed in the decisions.

[31] The Respondent further submits that, contrary to what is being suggested by the Applicant, the RPD never stated that it did not want to hear submissions. In fact, the RPD granted the Applicant the opportunity to make submissions, but he sent a letter to the RPD, through his immigration consultant, stating that he was awaiting the Member's decision in the case, letter which the RPD reasonably interpreted as the Applicant's waiver of his right to present submissions.

[32] As for the Applicant's argument that he never instructed his immigration consultant to inform the RPD that he was unable to secure additional documents in the US, the Respondent adds that the Applicant submitted no evidence relating to the actual instructions given. Therefore, this Court is in no position to assess this issue.

[33] The Respondent also submits that the Applicant failed to establish that he has limited ability to communicate in English that would prevent him from taking the necessary steps in order to obtain the requested documents from the US government. Indeed, there is evidence that the Applicant personally wrote to his former US counsel in English. Furthermore, considering that the RPD insisted on a number of occasions on how important it was for the Applicant to obtain these documents from the US government, it is likely that the Applicant would have known that the documents could have been relevant to the determination of the case and that he should have taken all the necessary steps to obtain them.

[34] Lastly, the Respondent raises an objection with regard to the additional RPD's decision submitted by the Applicant along with his Supplementary Affidavit, as this constitutes new evidence not to be taken into consideration by this Court.

VIII. Issue

[35] Did a breach of procedural fairness occur in the present case, such that this Court's intervention is warranted?

IX. Standard of review

[36] Issues of procedural fairness are reviewable on a standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 55, 60 and 79 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 43).

X. Analysis

[37] Contrary to what is being suggested by the Applicant, the case at bar presents no breach of procedural fairness which warrants the intervention of this Court.

[38] As a starting point, the issue of counsel's incompetence shall be addressed prior to that of the right to a hearing as the answer to the first question is crucial to the disposition of the second allegation of procedural unfairness. As a general rule, it is well known that counsel's conduct cannot be separated from that of the client, because counsel acts as an agent for the client. Indeed, a client who freely chooses representation must accept the consequences of this representation, subject to certain extraordinary cases where conduct of counsel will manifest such negligence that it will warrant overturning a decision on judicial review (*Huynh v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 642 at para 23, 21 Imm LR (2d) 18 and *Robles v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 374 at para 31, [2003] FCJ No 520).

[39] In the present matter, the fact that the Applicant's first counsel was not a lawyer changes nothing in this regard, as the same principles apply to the relationship between an applicant and an immigration consultant (*Dvorianova v Canada (Minister of Citizenship and Immigration)*, 2004 FC 413 at para 17, [2004] FCJ No 505 and *Cove v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 266, [2001] FCJ No 482).

[40] As rightly noted by the Respondent, in order for an applicant to demonstrate that his or her representative's conduct (i.e. his or her incompetence) amounted to a breach of procedural fairness which would warrant the intervention of this Court, the applicant in question must satisfy a three-pronged test set out in case law (*R v GDB*, 2000 SCC 22 at paras 26-29, [2000] 1 SCR 520 and *Yang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 269 at paras 17 and 24, [2008] FCJ No 344 [*Yang*]):

1. The representative's alleged acts or omissions constituted incompetence;

2. The Applicant was prejudiced by the alleged conduct; and,

3. There was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different.

[41] The onus of proving the incompetence of counsel lies with the Applicant (*Yang*, above, at para 18) who, in the present matter, fails on all three accounts.

[42] The Applicant first had to establish that his representative's alleged acts or omissions constituted incompetence but has provided no evidence to the effect that his immigration

consultant's actions were made contrary to his instruction. The Applicant did file an official complaint to the Immigration Consultants of Canada Regulatory Council against his immigration consultant. The complaint was filed on October 7, 2013 whereas the present application for judicial review was filed on April 2, 2013. It is true that this Court has previously stated that such forms of notification is deemed to be a major step in maintaining assertions of incompetence (*Ghahremani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1494 at para 11, [2006] FCJ No 1891). At the hearing, counsel for the Applicant informed the Court that the Immigration Consultants of Canada Regulatory Council has recently dismissed the complaint made against the consultant. Furthermore, the Applicant did not put forward any evidence as to the instructions given to his immigration consultant on the basis of which this Court could determine whether the consultant's conduct constituted incompetence. Therefore, the Applicant failed to satisfy the first prong of the applicable criteria.

[43] The Applicant also had the burden of establishing that he has suffered a prejudice and that a miscarriage of justice has occurred, which he did not do, thereby failing to meet the two last prongs of the applicable test. Indeed, the RPD mainly rejected the Applicant's claims on the basis of numerous and serious credibility findings, and the Applicant does not even challenge these findings. In fact, the RPD noted several contradictions in the Applicant's story, including the troubling fact that the Applicant seemed to have forgotten that his brother had been kidnapped and never seen again, and these credibility findings alone suffice to reject the Applicant's claims. However, the Applicant simply takes issue with the fact that he was allegedly deprived of his right to a hearing – and he puts forward no element of information to address how these findings are unreasonable or to explain the inconsistencies and implausibilities highlighted by the RPD in his evidence. What is

more, as rightly stated by the Respondent, the Applicant failed to explain how, had it not been for his counsel's alleged incompetence, he would have obtained the US documents for which the RPD adjourned the hearing in the first place. Therefore, he has not established that there is a reasonable probability that the result of the hearing would have been any different had it not been for his immigration consultant's incompetence and that, consequently, a miscarriage of justice occurred which would justify the intervention of this Court.

[44] For these reasons, I find that the alleged incompetence of the Applicant's immigration consultant does not amount to a breach of procedural fairness which would allow this Court to overturn the RPD's decision.

[45] The Applicant's main argument in the present matter however is that the RPD violated procedural fairness when it cancelled the second hearing, set for February 26, 2013. This Court finds that such is not the case. As properly stated by the Respondent, the Applicant's immigration consultant had sent, on December 7, 2012, the documents obtained from the US government accompanied by a letter, the end of which read as follows: "My client will be waiting [for] the Member's decision in this matter." In addition, a case management officer of the RPD spoke to the consultant on January 30, 2013 inquiring about the documents and forwarded a telecopy message on that same day (see Respondent's Memorandum of Argument, at page 15). The consultant then forwarded the December 7, 2012 letter along with the documents to the IRB on February 4, 2013 (see Certified Tribunal Record, at page 49). This shows consistent exchange between the RPD and the consultant, and at no time after the cancellation of the hearing on February 20, 2013 did the consultant object to this cancellation because he wanted to make submissions.

[46] As noted earlier, counsel's conduct generally cannot be separated from that of the client. Despite this rule, in some instances a decision could be overturned if a party successfully establishes the incompetence of counsel. It was previously shown that this is not the case in the present matter and, given my previous conclusion, I am forced to analyze the situation in light of the fact that the argument related to counsel's incompetence was rejected. The Applicant submits being entitled to a hearing and to present submissions. Although this statement is unquestionably correct and constitutes one of the most important principles of our justice system, I find that, as stated by the Respondent, the Applicant waived his right to be heard and to present submissions through his immigration consultant's actions. The RPD interpreted the communication received from the immigration consultant on behalf of the Applicant as a message from the Applicant himself. Having read the December 7, 2012 communication and the exchange that followed, and keeping in mind that counsel acts as an agent (i.e. in the name of) of the Applicant, this interpretation seems precisely correct or, in the least, it was certainly up to the RPD to interpret it this way.

[47] An applicant must live with the consequences of a freely chosen counsel's actions.

[48] In light of the foregoing, I find that the case at bar presents no breach of procedural fairness which would warrant this Court's intervention. Thus, on the basis of the grounds put forward by the Applicant, I find that the RPD's decision is correct and should be upheld.

[49] Furthermore, had the parties submitted arguments or issues which would have resulted in the consideration of the RPD's reasons as a whole, this Court would nevertheless have found the decision to be reasonable (*Dunsmuir*, above, at para 47) as the RPD made significant credibility

findings (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 at para 4, [1993] FCJ No 732), as detailed above, that were in no way challenged by the Applicant, and because these findings can warrant dismissing an application for refugee protection (*Sheikh v Canada (Minister of Employment and Immigration)* (1990), 11 Imm LR (2d) 81 at para 7, [1990] FCJ No 604).

[50] The parties were invited to submit questions for certification but none were proposed.

ORDER

THIS COURT ORDERS THAT this application for judicial review is denied. No question is certified.

"Simon Noël

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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