Federal Court  Cour fédérale

Date: 20150508

Docket: IMM-7620-13

Citation: 2015 FC 607

Ottawa, Ontario, May 08, 2015

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

YAZHKOVAN BALAZUNTHARAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Balazuntharam, is a Convention Refugee with a significant history of criminal activity since his arrival in Canada. In light of this history, a delegate of the Minister of Citizenship and Immigration [Delegate] on November 4, 2013, found the Applicant to be eligible for deportation to Sri Lanka by the Canada Border Services Agency [CBSA] because his presence constituted a danger to the public [Decision], pursuant to section 115(2)(a) of the

Immigration and Refugee Protection Act, (SC 2001, c 27) [IRPA]. This Decision, commonly known as a "danger opinion", is the focus of this judicial review.

[2] The deportation of Convention Refugees to nations where they may face persecution or torture, known as refoulement, is exceptional in nature, and must be triggered by acts of "substantial gravity" (*Nagalingam v Canada (Citizenship and Immigration)*, 2008 FCA 153 at para 76). When such recourse is considered, the delegate must balance the danger faced by applicant against the danger the applicant would present to the Canadian public if he was not removed (*Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at para 67; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 58 [*Suresh*]). Given Canada's firm commitment to human rights, the rule of law and principles of fundamental justice, this balance will generally tip against expulsion (*Suresh* at paras 4, 58).

[3] In this case, the question of whether the Applicant is a danger to the public must be revisited as a result of important affidavit evidence that was not before the Delegate. As I shall explain, the failure of the Delegate to consider this information - while no fault of her own - still contravened the Applicant's rights to procedural fairness, particularly the right to a fair hearing. The appropriate remedy for this breach is to send the matter back to the Delegate for reconsideration in light of this supplementary evidence.

II. The Decision

[4] The Applicant, a citizen of Sri Lanka, arrived in Canada in February 1998, and was granted refugee status shortly after, in December of that year. His criminality did not lag far

behind, and since the Applicant's first conviction in 2000, that tide has not stemmed. The Applicant's charges, convictions, incidents of violence, and problematic behaviour as presented in the Decision and the Record include:

> June 2000 – The Applicant was convicted of personation with intent, after falsely identifying himself with a temporary driver's license in the name of an acquaintance. Two months after his conviction, the Applicant's Health Card was seized from a male foreign national attempting to enter Canada, with its particulars related to identification having been altered.
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> November 2000 – The Applicant was reported to have assaulted an employee at gas station whom he suspected of having informed the Police of his criminal activity.
>
> June 2001 – Mr. Balazuntharam was convicted of and sentenced to two years of probation for the criminal harassment of his ex-girlfriend, whom he threatened to kidnap, rape and kill. The troublesome interaction between this young woman and the Applicant played a significant role in her attempted suicide, her leaving Canada as well as her seeking refuge in a youth shelter upon her return to this country.
>
> September 2001 – The Applicant was the victim of an attempted homicide when a group of male Sri Lankans opened gunfire on his vehicle. While Mr. Balazuntharam suggested that his ex-girlfriend's uncle was responsible for the attack, the police indicated that it may have been gang-related retribution.
>
> November 2002 – The Applicant was sentenced to 45 days in jail for failing to comply with a Probation Order, as he continued to pursue his ex-girlfriend by visiting her school.
>
> June 2008 – In his most serious conviction to date, according to the Applicant's Affidavit, Mr. Balazuntharam pled guilty to a 12 month conditional sentence for the possession of credit card forgery devices. During a search of his co-accused's home, the police discovered nearly one thousand completed or partially completed fraudulent credit cards, social insurance number cards, Ontario drivers licenses and a large quantity of forgery related equipment (Motion Record [MR], pp 408-409; see also p 1677 of Affidavit).

> June 2012 – The Applicant had been charged in relation to "Project Infraction", an operation targeting identity theft in the Greater Toronto Area, but these charges were stayed.

[5] The Delegate also considered information in police reports that she suggested linked Mr. Balazuntharam to a prominent gang in Toronto which is believed to be associated with the LTTE in Sri Lanka (Certified Tribunal Record [CTR], Vol 1, p 10).

[6] In finding the Applicant to be a danger to the public, the Delegate concluded that:

> Based on the evidence before me that Mr. Balazuntharam's criminal activities were both serious and dangerous to the public, in addition to the lack of evidence of rehabilitation given his lack of acceptance of responsibility for the fraud-related crimes, and the repetitive nature of his offences evidence by the facts underlying the charges made against him on several occasions despite the attempts of the criminal justice system to deter him from further criminal activity, I find, on a balance of probabilities, that Mr. Balazuntharam represents a present and future danger to the Canadian public, whose presence in Canada poses an unacceptable risk…
>
> (CTR, Vol 1, pp 17-18)

[7] The Delegate also concluded that given the current country conditions in Sri Lanka and Mr. Balazuntharam's original account of events as described in the Personal Information Form [PIF] he used in making his Refugee Claim, the transformation in Sri Lanka was such that the Applicant would "not personally face a risk to life, liberty or security of the person on a balance of probabilities" if returned (CTR, Vol 1, p 26).

III. Additional Evidence

[8] Over three weeks prior the November 4, 2013 danger opinion issuance, Applicant's counsel sent a 17 page facsimile to CBSA on October 11, 2013 containing an affidavit from Mr. Balazuntharam explaining why he was no longer a danger to Canadians, and feared detention and arrest should he be returned to Sri Lanka. The facsimile also contained an affidavit from Mr. Balazuntharam's ex-girlfriend, who was the victim of his criminal harassment conviction, and subsequent conviction for breach of probation.

[9] The Applicant argues that this affidavit evidence is relevant to the Delegate's conclusions regarding the risks he would face if returned to Sri Lanka, his remorse, and lack of danger he poses to Canadians. I see merit to this argument, and highlight a few passages from these two affidavits which could have informed the Delegate's conclusions, had they been considered:

> [4]…As I stated in my Personal Information Form ("PIF") before the Immigration and Refugee Board ("IRB"), I was forcibly recruited by the Liberation Tamil Tigers of Eelam ("LTTE") in Sri Lanka. As a result of this, I was arrested and detained by the Sri Lanka Army ("SLA") on a number of occasions on false suspicion that I was LTTE member. I eventually fled Sri Lanka after my last release and failed to report to the SLA camp as ordered. As far as the SLA is concerned, I am a [sic] LTTE member and they have treated me accordingly. The IRB found these events to be credible and granted me protection. As such, I am almost certain to be on a list of persons to be arrested on the spot when I arrive at Colombo International Airport…
>
> (MR, Vol. 6, Exhibit M, Affidavit of Mr. Balazuntharam, p 1673)
>
> [17] Since receiving refugee protection in Canada, I have been joined by my mother and my father in this country. My first few years in Canada were very difficult. It was a completely new country for me and it took me a long time to adjust to the culture and the norms here. Along the way, I made some serious mistakes for which I am regretful.
>
> (MR, Vol 6, Exhibit M, Affidavit of Mr. Balazuntharam, p 1677)

> [8] I can truly say that I have no fear or concerns about Mr. Balazuntharam moving forward. I know what he did before was wrong and he has accepted responsibility for this. But I truly believe he has changed and no longer poses a danger to me or anyone else. I think the incidents that happened in 2001 and 2002 were isolated to that time period and he has made a clean break with them. As far as I know, this was not a pattern of behaviour in his part and as I do not believe he has had problems with any other women or their families. As I said before, after being in Canada for a number of years, I think Mr. Balazuntharam finally realized that gender dynamics are very different in this country than they were in Sri Lanka – and that conduct may be common there is very much unacceptable here. I am confidence that he will not re-offend.
>
> (MR, Vol 6, Exhibit M, Affidavit of Ms. B (Mr. Balazuntharam's ex-girlfriend), p 1683)

[10] Despite being sent prior to the release of the decision, the Respondent conceded at the hearing that, for an unknown reason, these affidavits were never placed before the Delegate.

IV. Issues

[11] The disposition of this case turns on the answers the following questions:

(1) can the additional evidence, which was not placed before the decision-maker, be considered?

(2) if so, should the decision be sent back to the same decision-maker for reconsideration?

V. Analysis

[12] The question of whether the affidavit evidence should have been placed before and considered by the Delegate is a question of procedural fairness, reviewed on a standard of

correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Jayamaha Mudalige Don*, 2014 FCA 4 at para 36).

[13] The Respondent argues that the contested affidavit material should not have been considered, given that the Applicant was given a deadline of June 11, 2013 to submit documents for the Delegate's consideration.

[14] Administrative deadlines are of crucial importance, and their imposition should not be taken lightly. They help facilitate the orderly adjudication of claims, reduce duplication and inefficiency, and encourage parties to put their best foot forward at the first instance so that the most pertinent arguments may be given thorough consideration (*Abbott Laboratories Limited v Canada (Attorney General)*, 2008 FCA 354 at para 37). If the timeframe provided for the submission of materials is unreasonable, this should be communicated to the opposing party, who should consider, in good faith, whether an extension or other accommodation is warranted. As was recently demonstrated in my decisions of *Moors v Canada (National Revenue)*, 2015 FC 446 at para 25 and *Kamara v Canada (Citizenship and Immigration)*, 2015 FC 572 at paras 23 and 30, a failure to meet a deadline or communicate crucial information can often result in negative consequences for the Applicant that do not result in a violation of procedural fairness. If avoidable, it is a gamble not worth taking.

[15] That said, the irremediable nature of deportation when an applicant's life, liberty or security of the person is at stake allows for greater leeway in the strict application of procedure. Faced with the similar circumstance in *Chudal v Canada (Minister of Citizenship and*

Immigration), 2005 FC 1073 [*Chudal*], Justice Hughes concluded that absent bad faith or gross negligence on the part of the applicant, the latest relevant and significant evidence available must be considered by a pre-removal risk application [PRRA] Officer (*Chudal* at para 7). He further held that a PRRA Officer has an obligation to receive all evidence which may affect the decision until the time that such decision is made:

> [19] In the circumstances of a PRRA Officer's decision, the Officer has an obligation to receive all evidence which may affect the decision until the time that such decision is made. It is reasonable to consider that such decision is not made until it has been written and signed and notice of the decision, even if not its contents, has been delivered to the Applicant. … In the case where the Applicant has been advised that a decision will be made on a future date, it is reasonable to consider that the decision is made on that future date.
>
> (*Chudal* at para 19; see also *Avouampo v Canada (Citizenship and Immigration)*, 2014 FC 1239 at para 21; *Ayikeze v Canada (Citizenship and Immigration)*, 2012 FC 1395 at para 16)

[16] I see the same logic extending to danger opinions rendered by the Minister of Citizenship and Immigration or his delegates. While there seems to be no indication that it would have been infeasible to submit the additional affidavits prior to the June 11, 2013 deadline, they were submitted more than 3 weeks before the Decision was rendered. The failure of the Delegate to consider the affidavit evidence, despite no fault of her own, thus breached the Applicant's right to a fair judicial process as demanded by the principles of fundamental justice. In a fair hearing, the decision by the delegate must be based on the facts and the law (*Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 29; *Suresh* at paras 122-123). In a case such as this, where relevant and significant facts were submitted but not considered, the Delegate's decision reflects consideration of only *some* of the facts. Consequently, the matter should be sent

back for reconsideration, as the Applicant is entitled to have a decision rendered on the totality of the evidence submitted.

[17] Having found a violation of procedural fairness, I must now address the second issue - should the decision be sent back to the same Delegate for reconsideration?

[18] As a general rule, administrative decisions should generally not be reconsidered by the same decision maker "where they were earlier disqualified by bias, or if for any reason there is a reasonable apprehension that the original decision-maker is not likely to determine the matter objectively" (Donald J M Brown and John M Evans, *Judicial Review of Administrative Action in Canada*, Vol. 3. Toronto: Carswell, 1998 (loose leaf updated December 2014) at para 12:6320).

[19] Indeed, judges of the Federal Court routinely issue orders to send various matters back to a different decision maker in a successful judicial review, in large part to avoid the appearance or the prospect of a reconsideration decision not being rendered objectively upon return to the original decision maker (*Dena Hernandez v Canada (Citizenship and Immigration)*, 2010 FC 179 at para 44). Further, as I noted in *Abusaninah v Canada (Citizenship and Immigration)*, 2015 FC 234 at paras 44-47, while secondary decision makers are entitled to come to the same conclusions as the original decision maker if the facts and the law provide, their discretion may not be fettered by the original decision.

[20] However, an Order for reconsideration by a different decision maker is by no means required to remedy unreasonable decisions or violations of procedural fairness. This Court has

chosen to remit the matter to the same decision maker in circumstances, for example, where the decision maker has had particular familiarity with the case (*Canada (Citizenship and Immigration) v Harvey*, 2013 FC 717 at para 75); where it would lead to a more expeditious redetermination (*Canada (Citizenship and Immigration) v Liu*, 2013 FC 639 at para 1) or when the analysis was otherwise reasonable, but lacking in a particular area (*Awadh v Canada (Citizenship and Immigration)*, 2014 FC 521 at paras 27, 30-31).

[21] Judges have a role in balancing the competing concerns of, on the one hand, the prospect and appearance of impartial decision making, and on the other, the efficient use of judicial resources. This balancing ensures that judicial review remains an efficient and accessible method of review for applicants (*Canada (Attorney General) v Confédération des syndicats nationaux*, 2014 SCC 49 at para 1; *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 110; *Hryniak v Mauldin*, 2014 SCC 7 at paras 1-2, 32; *Federal Courts Rules* (SOR/98-106), Rule 3).

[22] In *Sittampalam v Canada (Citizenship and Immigration)*, 2007 FC 687 [*Sittampalam 2007*], Justice Snider remitted a danger opinion back to the same delegate after concluding that he erred in his assessment of the applicant's risk upon removal to Sri Lanka by failing to have regard to all of the evidence before him (*Sittampalam 2007* at para 68). Justice Mactavish opted for a similar remedy in *Thuraisingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 607 at paras 51, 54 [*Thuraisingam*].

[23] The delegate's decision in *Sittampalam 2007* was reconsidered, and judicial review of that reconsideration was subsequently sought in *Sittampalam v Canada (Citizenship and Immigration)*, 2009 FC 65 [*Sittampalam 2009*], wherein Justice Mandamin also found errors related to the applicant's risk analysis (*Sittampalam 2009* at para 78). Justice Mandamin chose to remit the matter back to the same delegate, in accordance with his reasons, given that the delegate was "familiar with the subject matter and the voluminous material involved" (*Sittampalam 2009* at para 82).

[24] Mr. Balazuntharam argues that the remedy in the *Sittampalam* cases can be distinguished from the case at bar because in those cases, the Court had found no error with the delegate's assessment that the applicant posed a danger to the public. In other words, the delegate did not have to reevaluate the applicant's danger to the public after having already labelled him so. Here, however, the Applicant submits that branding one a danger to the public is a decision which carries with it significant stigma, and its reevaluation is a far cry from the review of a more innocuous error (*R v MacDougall*, [1998] 3 SCR 45 at para 34). Since reevaluation of the danger finding is required here, the Applicant submits that it must be sent to a different delegate.

[25] I am not persuaded by this argument. While it is true that the *Sittampalam* cases, as well as *Thuraisingam*, did not deal with revisiting the applicant's danger to Canadians, it can be argued that determining whether one is likely to be faced with brutality, persecution or torture at the hands of a military or paramilitary organization upon their removal from Canada is no less an emotionally charged and weighty decision for a delegate.

[26] Further, the 26-page Decision under review is comprehensive and articulate. I do not think it necessary to opine whether good faith on the part of administrative decision makers should be presumed, as there is no evidence before me to suggest that the Delegate has acted in bad faith or would otherwise be biased in her evaluation upon reconsideration (*Nguyen v Canada (Minister of Citizenship and Immigration)*, IMM-4170-97 at para 6). In my view, the suggestion that the Delegate in this case would be unable to alter her conclusions after considering the additional affidavit evidence is speculative.

[27] The Applicant's stance, namely that the reconsideration must go to a different delegate, would also eliminate the discretion of this Court to take into account judicial resources and administrative efficiencies. While I do not wish to discount the risks of prejudice inherent in labelling one a danger to the public, there are cases, such as this one, where risks upon reconsideration by a new decision maker are outweighed by the benefits gained by having the same Delegate revisit the matter.

[28] One of these benefits is an expeditious reconsideration of the Decision in light of the additional affidavit evidence. These submissions, totalling 17 pages, are part of a voluminous record exceeding 1800 pages.

[29] The Applicant acknowledges that given that more than 16 months has passed since the Decision was rendered, the Delegate may not remember the precise details of the file (Applicant's Further Submissions on Remedy, p. 9, para 23). I see this as reason to believe, as opposed to doubt, that the Delegate will view the new evidence, as well as the Applicant's

underlying history, afresh. The efficiency in adjudicative resources comes not in reviewing the precise details of the file, which she must undoubtedly repeat, but in her familiarity with its general contents and organization. Consequently, the reconsideration decision is likely to be released more expeditiously under her hand than that of a new delegate, which is of particular relevance in this case, since the Applicant is being held in a detention facility. Reading a book is generally faster the second time around than the first, even if one has forgotten a good deal of what happened in the meantime. That matters when the book is nearly 2000 pages long.

[30] I wish to emphasize that given the violation of procedural fairness and the need for the Delegate to revisit her conclusions in light of the new affidavit evidence, I take no position on the reasonableness of the Decision.

[31] The Application for judicial review is allowed, and the matter sent back for reconsideration by the same Delegate upon consideration of these reasons.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. There is no order as to costs.

3. No questions for certification were raised.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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