Federal Court  Cour fédérale

Date: 20151112

Docket: IMM-6630-14

Citation: 2015 FC 1264

Toronto, Ontario, November 12, 2015

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

CHANTHIRAKUMAR SELLATHURAI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Immigration and Refugee Board found that Chanthirakumar Sellathurai was inadmissible to Canada on security grounds because of his past membership in the Liberation Tigers of Tamil Eelam, an organization for which there are reasonable grounds to believe has engaged in acts of terrorism. Mr. Sellathurai then sought Ministerial relief from the finding of inadmissibility in accordance with subsection 34(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. His request was denied by the Honourable Steven Blaney, the then-Minister of Public Safety and Emergency Preparedness.

[2] Mr. Sellathurai now seeks judicial review of the Minister's decision, asserting that the Minister breached the duty of fairness owed to him by failing to personally provide reasons for his decision, or to properly adopt the rationale provided by a departmental official as his reasons. The Minister further erred, Mr. Sellathurai says, in making an adverse credibility finding against him without first conducting a personal interview, and by failing to carry out a balanced assessment of his application for Ministerial relief.

[3] For the reasons that follow, I find that the Minister did not err as alleged. Consequently, Mr. Sellathurai's application for judicial review will be dismissed.

I. Background

[4] Mr. Sellathurai is a Tamil citizen of Sri Lanka who says that he first became involved in Tamil causes in 1982, when he joined the Tamil United Liberation Front. In 1983, Mr. Sellathurai was arrested by the Sri Lankan police because of his involvement in the organization, and it is at this point that he says that he became supportive of the Liberation Tigers of Tamil Eelam (LTTE).

[5] Mr. Sellathurai claims he never formally joined the LTTE because he does not believe in violence. He acknowledges that he did, however, provide assistance to the LTTE in order to reduce the pressure being placed on him to formally join the organization. Amongst other things, Mr. Sellathurai says that he provided food and refreshments at meetings, distributed pamphlets, engaged in fundraising, assisted in recruitment, and provided transportation services to the LTTE. Mr. Sellathurai also assisted the LTTE in the civil administration of Jaffna between 1986

and 1987, performing volunteer work that included taking injured persons to hospitals, building air raid shelters, collecting food and clothing, and helping the homeless.

[6] In a 2001 admissibility decision, the Immigration and Refugee Board found that Mr. Sellathurai's activities on behalf of the LTTE were sufficient to make him a member of the organization. In coming to this conclusion, the Board found that Mr. Sellathurai's efforts on behalf of the LTTE were "important and essential for [the group]", and that Mr. Sellathurai's activities were "essential components required for the LTTE to continue functioning". Mr. Sellathurai's application for leave to judicially review this decision was dismissed, with the result that the IRB's finding on this point is now final.

[7] Mr. Sellathurai joined the World Tamil Movement (WTM) after his arrival in Canada in 1987, and he remained associated with the organization until 1997. Mr. Sellathurai was a director of the WTM from 1989 to 1992, although he has denied that he held a leadership role in the organization. Mr. Sellathurai's participation in the WTM consisted of volunteering at the WTM newspaper, conveying the news from Sri Lanka over the radio and telephone, assisting in the production of the WTM's local radio broadcast, and emceeing WTM social and cultural events. Mr. Sellathurai also engaged in fundraising for the WTM from 1991 to 1994, although the amount of money raised by him is in dispute. Mr. Sellathurai acknowledges that the monies that he raised were then forwarded to the LTTE in Sri Lanka, although he says that he was not aware of this at the time.

II. Mr. Sellathurai's Immigration History

[8] Mr. Sellathurai arrived in Canada on April 21, 1987, and claimed refugee protection upon his arrival. On January 31, 1990, Mr. Sellathurai was found to have a credible basis for a claim to be a Convention refugee, allowing him to apply directly for permanent residence in Canada without there being a formal determination of his refugee claim by the IRB. As a result, Mr. Sellathurai has never been determined to be a Convention refugee.

[9] Mr. Sellathurai applied for permanent residence on June 8, 1992, and his application was denied on July 14, 1997. The refusal resulted from Citizenship and Immigration Canada's determination that there were reasonable grounds to believe that he was inadmissible to Canada under section 19(1)(f)(iii)(B) of the *Immigration Act*, R.S.C. 1985, c. I-2, because of his involvement with the LTTE. The IRB made a final determination regarding Mr. Sellathurai's inadmissibility in October of 2001, finding that he was, in fact, a member of the LTTE and was therefore inadmissible under section 19(1)(f)(iii)(B). As noted earlier, Mr. Sellathurai sought leave to judicially review this decision, and leave was refused on November 7, 1997.

[10] On August 20, 2002, Mr. Sellathurai applied for Ministerial relief from the IRB's inadmissibility findings, making detailed submissions in support of his application. He provided additional submissions in March of 2006, May of 2006, July of 2007, October of 2008, December of 2008, January of 2013 and February of 2014.

[11] Mr. Sellathurai was provided with drafts of the Canada Border Services Agency's recommendation to the Minister in April of 2006, September of 2008, July of 2010, July of 2011, and December of 2013. The CBSA made its final recommendation to the Minister on July 4,

2014, and the Minister made his decision denying Mr. Sellathurai relief on August 19, 2014. It is the Minister's decision denying relief to Mr. Sellathurai under subsection 34(2) of *IRPA* that underlies this application for judicial review.

III. The Minister's Decision

[12] As is the practice in cases such as this, the CBSA prepared a briefing note summarizing the application for consideration by the Minister. The summary in this case is some 15 pages long. It provides an overview of the Ministerial relief process and identifies the legal test that is to be applied by the Minister in deciding whether relief should be granted to Mr. Sellathurai. The document further provides background information regarding both the LTTE and the WTM. It then reviews Mr. Sellathurai's immigration history and discusses a disclosure issue that arose at one stage of the process.

[13] Under the heading "Elements Considered", the briefing note provides a detailed discussion of Mr. Sellathurai's involvement with the LTTE and the WTM, including his version of various events and his position on several issues. The brief then provides an assessment of Mr. Sellathurai's application, discussing the evidence weighing against Mr. Sellathurai and explaining why Mr. Sellathurai's arguments on various points should not be accepted. The analysis concludes with a recommendation by the President of the CBSA that Ministerial relief not be granted to Mr. Sellathurai.

[14] The document concludes with a statement by the Minister that he was "not satisfied that the presence of Mr. Chanthirakumar Sellathurai in Canada would not be detrimental to the national interest. I deny relief."

IV. Analysis

[15] Before turning to consider Mr. Sellathurai's arguments, it is important to start by noting that it is the applicant for Ministerial relief who bears the onus of satisfying the Minister that his or her presence in Canada would not be detrimental to the national interest: *Al Yamani v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 381 at para. 69, 311 F.T.R. 193.

[16] Given the discretionary nature of subsection 34(2) decisions, the standard of review to be applied in reviewing the substance of a decision of the Minister refusing to grant Ministerial relief is that of reasonableness: *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 49-50, [2013] 2 S.C.R. 559.

[17] With these principles in mind, I will address Mr. Sellathurai's arguments as to the alleged errors in the decision under review.

V. Did the Minister Adopt the Briefing Note as his Reasons?

[18] Mr. Sellathurai first submits that the Minister cannot be presumed to have adopted the reasoning contained in the briefing note, and that he was required to provide his own reasons for denying relief. In the absence of such reasons, Mr. Sellathurai submits we cannot know whether the Minister conducted a balanced assessment of Mr. Sellathurai's application, the result being that the Minister's decision lacks the justification, transparency and intelligibility required of a reasonable decision: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190.

[19] Citing the Supreme Court's decision in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, Mr. Sellathurai argues that in the specific factual context of this case, it was not sufficient for the Minister to simply adopt a recommendation from the Minister's officials as his own reasons.

[20] The argument now being advanced by Mr. Sellathurai has been considered and rejected in a number of decisions of this Court: see, for example, *Al Yamani*, above at paras. 52, 54-59; *Miller v Canada (Solicitor General)*, 2006 FC 912 at paras. 61-62, [2007] 3 F.C.R. 438. More importantly, the argument has also been rejected by the Federal Court of Appeal in *Haj Khalil v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FCA 213 at para. 29, 464 N.R. 98.

[21] Mr. Sellathurai contends that these decisions are distinguishable, submitting that even if a briefing note could otherwise serve as reasons for a Minister's decision, in this case, the Minister did not formally adopt the reasons as his own. That is, instead of specifically stating that he concurred with the findings contained in the briefing note, as appears to have been done in the *Miller* case, in this case the Minister merely noted on the briefing note that he was "not satisfied that the presence of Mr. Chanthirakumar Sellathurai in Canada would not be detrimental to the national interest". Nowhere does the Minister specifically state that he was adopting the briefing note as his reasons.

[22] I do not accept this submission, which is, in my view, based upon a selective reading of the document. The analysis in the briefing note concludes with a statement by the President of the CBSA that "the CBSA is not satisfied that the presence of Mr. Sellathurai in Canada would not be detrimental to the national interest". Immediately prior to the page set aside for the

Minister's signature, the President states "[t]he CBSA requests that you review the attachments in the context of the Agency's assessment and indicate your approval or denial of Mr. Sellathurai's application for Ministerial relief". The note goes on to advise the Minister that "[i]f you agree with the CBSA's recommendation to deny relief, Mr. Sellathurai will not be relieved from inadmissibility …". The recommendation concludes by stating that "If you do not agree with the CBSA's recommendation to deny relief to Mr. Sellathurai, please provide reasons".

[23] The Minister then ticked off the box indicating that relief was being denied, which was located under the statement that he was "not satisfied that the presence of Mr. Chanthirakumar Sellathurai in Canada would not be detrimental to the national interest."

[24] When the Minister's decision is viewed in context, it is clearly implicit that, in concurring with the recommendation contained in the briefing note, the Minister was adopting the reasoning of the President of the CBSA as his own. The purpose of the duty to provide reasons is so that the person affected by the decision knows why the decision was made. It is quite clear from a review of the document as a whole why the Minister chose not to grant Ministerial relief to Mr. Sellathurai, and no error has been demonstrated in this regard.

VI. Was Mr. Sellathurai Entitled to an Oral Hearing?

[25] Mr. Sellathurai also argues that he was denied procedural fairness in this matter, as credibility findings were made in the briefing note without him first being afforded an oral hearing.

[26] Where an issue of procedural fairness arises, the Court's task is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the

circumstances: see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para. 43, [2009] 1 S.C.R. 339.

[27] The right to an oral hearing is not absolute. As the Supreme Court observed in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 30-34, 174 D.L.R. (4th) 193, the principles of procedural fairness require that a party be given a meaningful opportunity to participate in the proceeding and that they be able to present their case fully and fairly. This principle is to be applied flexibly, however, depending on the nature of the proceeding, with the result being that some cases will require an oral hearing, while others will not. The overriding question in all instances is whether the party was afforded a meaningful opportunity to participate in the proceeding.

[28] I accept that the decision under review has significant consequences for Mr. Sellathurai, which would suggest that he is entitled to a higher level of procedural fairness than might otherwise be the case. However, the Supreme Court held in *Baker*, that even where a high degree of procedural fairness is owed to a party, an oral hearing is not necessarily required if the party has other ways of meaningfully participating in the proceeding: at paras. 32-34.

[29] That is clearly the case here. Mr. Sellathurai has had several in-person examinations, including his initial examination by CIC in 1987, and subsequent examinations by the Canadian Security Intelligence Service. He had an oral hearing before the Immigration and Refugee Board, where he had the opportunity to address the nature and extent of his involvement with the LTTE. He has been made fully aware of CBSA's draft recommendations, and he has provided detailed submissions in response to these recommendations on approximately eight separate occasions.

[30] Mr. Sellathurai has thus had ample opportunity to meaningfully participate in this process, and I am satisfied that in these circumstances, the requirements of procedural fairness have been met, despite the fact that Mr. Sellathurai was not examined in person by either the CBSA or by the Minister.

VII. Was the Minister's Decision Reasonable?

[31] Mr. Sellathurai's remaining submissions go to the reasonableness of the Minister's decision. His principle submission is that the CBSA briefing note was not balanced, with the result that the Minister's decision was based upon an unfair summary of the facts and was thus unreasonable.

[32] Subsection 34(2) of *IRPA* empowers the Minister of Public Safety and Emergency Preparedness to grant relief from a finding of inadmissibility under subsection 34(1) of the Act where an applicant can satisfy the Minister "that their presence in Canada would not be detrimental to the national interest".

[33] The test to be applied by the Minister in deciding whether Ministerial relief should be granted in a given case was identified by the Supreme Court of Canada in *Agraira*, above. There, the Court held that "a broad range of factors may be relevant to the determination of what is in the "national interest", for the purposes of s. 34(2)": at para. 87. In general, the Minister should be guided by the factors articulated in CIC's Guidelines regarding "National Interest", which include:

1. Will the applicant's presence in Canada be offensive to the Canadian public?

2. Have all ties with the regime/organization been completely severed?

3. Is there any indication that the applicant might be benefiting from assets obtained while a member of the organization?

4. Is there any indication that the applicant may be benefiting from previous membership in the regime/organization?

5. Has the person adopted the democratic values of Canadian society?

Agraira, above at para. 87 & Appendix D

[34] An interpretation of the national interest that relates primarily to national security and public safety, but which does not exclude the other considerations is reasonable: *Agraira*, above, at para. 88.

[35] Mr. Sellathurai does not take issue with the test that was applied in this case, but rather with its application to the facts of the case. It is not, however, this Court's role, sitting in review of the Minister's decision, to engage in a re-weighing exercise: *Agraira*, at para. 91.

[36] With this understanding of the relevant principles, I turn now to address Mr. Sellathurai's contention that the assessment of his application for Ministerial Relief was neither fair nor balanced.

[37] I would start by observing that Mr. Sellathurai concedes that although he never took out formal membership in the LTTE, he was properly considered to be a "member" under the expansive definition given to the concept of membership in the jurisprudence. He argues,

however, that "there are members and there are members", and that a fair and balanced assessment of his level of involvement in pro-Tamil causes would not lead a reasonable person to conclude that his presence in Canada would not be detrimental to the national interest.

a) Failure to Consider the Issue of Self-Determination

[38] Mr. Sellathurai first says that the Minister's decision failed to take into account the context facing Tamils in Sri Lanka. Mr. Sellathurai points to the long-standing oppression of the Tamil population of Sri Lanka by the Sinhalese majority, submitting that his actions have to be viewed in light of the right of the Tamil population to self-determination and freedom from oppression.

[39] The difficulty with this submission is that the briefing note makes several references to Mr. Sellathurai's argument on this point, and addresses it directly at page 12 of the document. It notes that while the right to self-determination is recognized at international law, it does not endorse the right to use violence or force in support of this goal. The Minister was therefore aware of Mr. Sellathurai's position on this issue, and an explanation was provided as to why his submission should not be accepted.

b) LTTE Activities at the Time that Mr. Sellathurai Became a Member

[40] Mr. Sellathurai also argues that his direct involvement with the LTTE took place in 1983 and 1984, early on in the LTTE's existence, submitting that he could not have known how violent the LTTE would later become. It was unfair, Mr. Sellathurai says, to attribute greater knowledge of the LTTE's violent activities to him than was available at the time he became involved with the organization.

[41] Mr. Sellathurai's suggestion that the LTTE's terrorist activities were not apparent at the time of his involvement is not, however, borne out by a review of the record. There was substantial documentary evidence before the Minister that showed that the LTTE, in both its present and past incarnations, had been involved in violent activities before Mr. Sellathurai became associated with the organization.

c) The Nature of Mr. Sellathurai's Involvement with the LTTE

[42] Mr. Sellathurai also argues that insufficient weight was given to the fact that he was not personally involved in violent activities on behalf of the LTTE. As noted earlier, it is not the task of this Court, sitting in review of the Minister's decision, to re-weigh the evidence that was before the Minister. Moreover, the briefing note specifically described the nature of Mr. Sellathurai's activities, and the Minister was thus aware that Mr. Sellathurai was not personally involved in violent activities on behalf of the LTTE.

[43] The Minister was, however, also aware of the fact that the IRB had previously determined that Mr. Sellathurai's efforts on behalf of the LTTE were "important and essential for [the group]", and that his activities were "essential components required for the LTTE to continue functioning".

d) Mr. Sellathurai's Involvement with the WTM

[44] Mr. Sellathurai submits that the Minister failed to have regard to the fact that the World Tamil Movement had not been listed as a proscribed terrorist entity by the Government of Canada at the time that he joined the organization in the late 1980's. However, the briefing note makes specific reference to the fact that Mr. Sellathurai had terminated his association with the

WTM prior to its listing as a terrorist entity. The note further observes that the Government's decision to list the WTM as a terrorist organization was based on present and past activities of the organization, including activities that took place during the time Mr. Sellathurai was involved with the organization.

[45] The note also observes that Mr. Sellathurai was aware of the Government's concerns regarding the WTM's links to the LTTE as he stated that he finally disassociated himself from the WTM in 1997 out of concern that his continued involvement with the organization was undermining his efforts to obtain permanent residency in Canada. The briefing note further observed that open source information indicated that the WTM had been raising money for the LTTE as far back as the late 1980's, and that the organization was known as a front for the LTTE. Mr. Sellathurai himself acknowledged that this was well known in the Tamil community in Canada, although he provided conflicting evidence as to the extent of his own awareness of the relationship between the WTM and the LTTE.

[46] Mr. Sellathurai also submits that his involvement with WTM newspaper and radio activities was Charter-protected speech. Once again, this argument was not ignored, but was specifically referenced in the briefing note. Mr. Sellathurai's argument also ignores the fact that the Courts have specifically stated that conduct associated with terrorist organizations cannot enjoy Charter protection: *Suresh v Canada (Minister of Citizenship & Immigration)*, [2000] 2 F.C. 592 at paras. 35-36, 183 D.L.R. (4th) 629.

[47] Finally, while Mr. Sellathurai admits that he raised money in Canada for the WTM, he takes issue with the statement in the briefing note that he had admitted to raising some $13,000

for the WTM. According to Mr. Sellathurai, this was an adverse credibility finding, one that should not have been made in the absence of an interview.

[48] The statement that Mr. Sellathurai had admitted to raising $13,000 for the WTM is contained in the notes of an interview that Mr. Sellathurai had with CSIS. Mr. Sellathurai does not actually deny making the statement attributed to him – rather he says that he does not *remember* making the statement. Moreover, the briefing note specifically mentioned the fact that Mr. Sellathurai disputed the amount that he had raised on behalf of the WTM, and no finding was made as to the amount of money that had been raised by Mr. Sellathurai. What was important, however, was the fact that Mr. Sellathurai was raising money for the WTM – not the precise dollar value of the funds that he had raised.

[49] Mr. Sellathurai also denies that he knew that the money that he raised was being passed on to the LTTE The briefing note observed that Mr. Sellathurai had provided conflicting information as to his awareness of the use that was being made of the funds that he raised. It considered the conflicting evidence and came to the determination that Mr. Sellathurai likely did know the money that he raised was being forwarded to the LTTE

VIII. Conclusion

[50] Having carefully considered Mr. Sellathurai submissions, I have concluded that the Minister followed the guidance provided by the Supreme Court in *Agraira*, that he considered all of the relevant factors, and that he assessed all of the evidence in the record before him. Mr. Sellathurai's submissions are essentially a request to have the Court re-weigh the evidence and come to a different conclusion

[51] The burden was on Mr. Sellathurai to establish that his continued presence in Canada would not be detrimental to the national interest. The Minister refused to provide discretionary relief to Mr. Sellathurai, as he was not satisfied that this burden had been discharged. The Minister's conclusion was reasonable in light of the record before him.

[52] The application for judicial review is therefore dismissed. I agree with the parties that the case is fact-specific, and does not raise a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Anne L. Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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