Federal Court of Appeal

Cour d'appel fédérale

Date: 20121119

Docket: A-33-12

Citation: 2012 FCA 299

CORAM: **SHARLOW J.A.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

CHANTHIRAKUMAR SELLATHURAI

Appellant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Heard at Toronto, Ontario, on October 22, 2012.

Judgment delivered at Ottawa, Ontario, on November 19, 2012.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: DAWSON J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The appellant Chanthirakumar Sellathurai has come to this Court for a second time to deal with what he sees as the unfair consequences of a mistake on the part of the Canada Border Services Agency (CBSA) in dealing with documents containing information subject to national security privilege.

[2] Mr. Sellathurai is a Tamil from the north of Sri Lanka. He has been living in Canada for 25 years. He came to Canada in 1987 seeking refugee status. In 1990, he was found to have a credible basis for a refugee claim under the former *Immigration Act*, R.S.C. 1985, c. I-2. As the law

stood in 1990, a credible basis finding was one step on the road to having a refugee claim determined. However, Mr. Sellathurai's refugee claim was never determined because in 1992, Mr. Sellathurai started on a different procedural path by applying for landing under an expedited procedure, the "Refugee Backlog Program", established by amendments to the *Refugee Claimants Designated Class Regulations*, SOR/90-40.

[3] By virtue of paragraph 3(2)(*e*) of the *Refugee Claimants Designated Class Regulations*, an application for landing would be denied to any person described in any of paragraphs 19(1)(*c*) to (*g*), (*j*) or 27(2)(*c*) of the *Immigration Act*. In 1996 or 1997, an issue was raised as to whether Mr. Sellathurai was a person described in clause 19(1)(*f*)(iii)(B), which at the time read as follows:

19. (1) No person shall be granted admission who is a member of any of the following classes:	**19.** (1) Les personnes suivantes appartiennent à une catégorie non admissible :
…	…
(f) persons who there are reasonable grounds to believe	*f)* celles dont il y a des motifs raisonnables de croire qu'elles :
…	…
(iii) are or were members of an organization that there are reasonable grounds to believe is or was engaged in	(iii) soit sont ou ont été membres d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée :
…	…
(B) terrorism,	(B) soit à des actes de terrorisme,
except persons who have satisfied the Minister that their admission would not be detrimental to the national interest;	le présent alinéa ne visant toutefois pas les personnes qui convainquent le ministre que leur admission ne serait nullement préjudiciable à l'intérêt national;

[4] An immigration officer prepared a report dated August 11, 1997 concluding that there were reasonable grounds to believe that Mr. Sellathurai was a *de facto* member of a terrorist organization known as the Liberation Tamil Tigers of Eelam (LTTE) because he participated in providing it financial support and directed interested people to it. That report led to an admissibility hearing by the Immigration Division. By agreement, the admissibility hearing was divided into two parts. The first part would deal with the question of whether there were reasonable grounds to believe that Mr. Sellathurai was a member of the LTTE. The second part would deal with the question of whether the LTTE was a terrorist organization.

[5] The first part of the admissibility hearing ended with a decision dated September 26, 2001 that there were reasonable grounds to believe that Mr. Sellathurai was a member of the LTTE. Mr. Sellathurai filed an application in the Federal Court under section 82.1 of the *Immigration Act* for leave to seek judicial review of that decision. The application for leave was dismissed on January 24, 2002. By virtue of section 82.2 of the *Immigration Act*, no appeal was possible from the decision denying leave.

[6] The second part of the admissibility hearing has not yet been concluded. Those proceedings have been stayed pending the disposition of an application by Mr. Sellathurai for Ministerial relief, as explained below.

[7] As indicated above, Mr. Sellathurai's admissibility hearing initially proceeded under the *Immigration Act*. Effective June 28, 2002, the *Immigration Act* was repealed and replaced by the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[8] The statutory provision that was the focus of the first part of Mr. Sellathurai's admissibility hearing, clause 19(1)(*f*)(iii)(B) of the *Immigration Act*, was replaced by paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*. The Ministerial relief provided in the closing words of subsection 19(1) of the *Immigration Act* was replaced by subsection 34(2) of the *Immigration and Refugee Protection Act*. The new provisions read as follows:

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	**34.** (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
(*a*) engaging in an act of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada;	*a*) être l'auteur d'actes d'espionnage ou se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
(*b*) engaging in or instigating the subversion by force of any government;	*b*) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
(*c*) engaging in terrorism;	*c*) se livrer au terrorisme;
… or	…
(*f*) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (*a*), (*b*) or (*c*).	*f)* être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas *a*), *b*) ou *c*).
(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign	(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence

national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	au Canada ne serait nullement préjudiciable à l'intérêt national.

[9] In August of 2002, Mr. Sellathurai made an application for Ministerial relief under subsection 34(2) of the *Immigration and Refugee Protection Act*. That application is still pending.

[10] Meanwhile, in December of 2008, the Immigration Division decided to continue with the second part of the admissibility hearing. Mr. Sellathurai successfully applied to the Federal Court for leave to seek judicial review of the Immigration Division's denial of further adjournments. The leave application has been adjourned, subject to the obligation of the parties to keep the Federal Court apprised of developments with respect to Mr. Sellathurai's application for Ministerial relief.

[11] In July of 2010, in connection with the application for Ministerial relief, the CBSA provided Mr. Sellathurai's counsel with a copy of a brief it had prepared for the Minister containing a report and supporting documents. The report recommended that the Minister deny Mr. Sellathurai's application for relief under subsection 34(2). By mistake, the copy of the brief provided to Mr. Sellathurai contained copies of three documents (the "Disputed Documents") provided by the Canadian Security Intelligence Service (CSIS) that had not been reviewed by CSIS so that privileged or confidential information could be redacted.

[12] As it turned out, the Disputed Documents contained some information that CSIS concluded should have been redacted on the basis of national security privilege. On August 11,

2010, the CBSA became aware of the inadvertent disclosure of that privileged information. Counsel for Mr. Sellathurai was advised of the error and was asked to return the brief and any copies that had been made. Her response was to seal the material and ask for further information. She also indicated that Mr. Sellathurai and several members of the Tamil community had seen the brief and reviewed it closely.

[13] In response, the CBSA identified the Disputed Documents to counsel for Mr. Sellathurai. She sealed the Disputed Documents and assured the CBSA that no copies had been made. The Crown sought directions from the Federal Court in the judicial review application then pending with respect to the Immigration Division's decision not to adjourn the second part of the admissibility hearing.

[14] On September 2, 2010, Justice Hughes ordered counsel for Mr. Sellathurai to file the Disputed Documents with the Court in a sealed envelope marked with an instruction that the envelope was not to be opened without a further order or direction. His order also required the Crown to provide counsel for Mr. Sellathurai with copies of the Disputed Documents with redactions of the information for which national security privilege was claimed, and to file a motion as to the further disposition of the Disputed Documents.

[15] The Crown filed the motion as required. The motion was heard by Justice Snider. She granted the motion in an order dated November 3, 2010 (*Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2010 FC 1082, [2012] 2 F.C.R. 218). Her order reads as follows:

THIS COURT ORDERS, DECLARES AND DIRECTS that:

a) the Order of Justice Hughes, dated September 2, 2010, is confirmed;

b) the national security claim of privilege over those portions of the Disputed Documents, as asserted by the Minister, is upheld;

c) to the extent that any of the following steps have not been taken, the Court orders that:

- the Applicant seal and return to the Minister, through his counsel, any paper copy of the unredacted Disputed Documents;
- the Applicant destroy any electronic copy of the unredacted Disputed Documents in the control or possession of the Applicant or his counsel; and
- the Applicant and his counsel destroy any notes in their possession or control relating to the redacted portions of the Disputed Documents.

d) The unredacted Disputed Documents, that currently are in a sealed envelope filed with the Court and that form part of this Court File, are to be returned by the Registry to the Minister's counsel; and

e) no question of general importance is certified.

[16] Despite the lack of a certified question, Mr. Sellathurai appealed the order of Justice Snider. The appeal was heard on June 9, 2011 and allowed in part on July 11, 2011 (*Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 223, [2012] 2 F.C.R. 243). I summarize as follows the conclusions reached by this Court on the appeal:

(a) Absence of certified question.

Generally, in matters involving applications for judicial review of decisions made under the *Immigration and Refugee Protection Act*, no appeal lies to this Court from an interlocutory order (paragraph 72(2)(*e*)), or from a final order in the absence of a certified question (paragraph 74(*d*)). The former *Immigration Act* contained provisions to the same effect. The order sought to be appealed was an interlocutory order in an application for judicial review of a decision under the *Immigration Act* (the decision of the Immigration Division not to adjourn the admissibility hearing). Normally, the Federal Court could not have entertained the appeal. However, one of the issues in the appeal was whether the Federal Court had the jurisdiction to consider the Crown's motion for recognition of its claim of national security privilege for documents disclosed in the application for Ministerial relief under subsection 34(2) of the *Immigration and Refugee Protection Act*. Because of that jurisdictional question, the appeal could proceed (*Horne v. Canada (Minister of Citizenship and Immigration)*, 2010 FCA 337, *Subhaschandran v. Canada (Solicitor General)*, 2005 FCA 27, and *Narvey v. Canada (Minister of Citizenship and Immigration)* (1999), 235 N.R. 305 (F.C.A.)).

(b) Jurisdiction.

The Federal Court has the jurisdiction to consider the Crown's claim of national security privilege for the Disputed Documents pursuant to section 44 of the *Federal*

Courts Act, R.S.C. 1985, c. F-7 and the Federal Court's plenary jurisdiction over disclosure in immigration matters (sections 3, 18 and 18.1 of the *Federal Courts Act* and subsection 72(1) of the *Immigration and Refugee Protection Act*). Section 44 of the *Federal Courts Act* reads as follows:

44. In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a *mandamus*, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.	**44.** Indépendamment de toute autre forme de réparation qu'elle peut accorder, la Cour d'appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un *mandamus*, une injonction ou une ordonnance d'exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu'elle juge équitables.

Because the source of the Federal Court's legal authority to order the return of the Disputed Documents is section 44 of the *Federal Courts Act*, the provisions of the *Immigration and Refugee Protection Act* precluding an appeal did not apply.

(c) Procedure.

Rather than file a motion for the return of the Disputed Documents in the pending judicial review application, the Crown should have filed an independent notice of application as was done in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626. However, its failure to do so was a procedural irregularity of no consequence (Rule 56 of the *Federal Courts Rules*, SOR/98-106).

(d) Whether the judge erred in ordering the return of the Disputed Documents.

The redacted portions of the Disputed Documents are the proper subject of the Crown's claim of national security privilege, and the information for which the Crown asserts national security privilege was disclosed inadvertently. These facts support the judge's order for the return of the Disputed Documents. However, it was alleged by Mr. Sellathurai that the claim of national security privilege was overbroad because some of the information sought to be redacted had been previously disclosed in immigration proceedings. The judge did not consider whether fairness required that counsel for Mr. Sellathurai be permitted to make some limited use of the previously disclosed information, for example, by making confidential submissions to the Court or the Minister.

(e) Whether the judge erred in rejecting the request of Mr. Sellathurai for appointment of an *amicus curiae*.

The judge, in rejecting the request for appointment of an *amicus curiae*, did not consider the unique circumstances of the case, in particular, that the redacted portions of the Disputed Documents had already been disclosed to counsel for Mr. Sellathurai.

[17] On the basis of the conclusions in items (d) and (e) above, this Court made the following order:

> The appeal is allowed to the limited extent of remitting the matter to Justice Snider, or another designated judge of the Federal Court (as may be determined by the Chief Justice of the Federal Court), for the

> purpose of considering whether in the circumstances an *amicus curiae* should be appointed to assist the Court and what, if any, remedy is required by application of the principles of procedural fairness as a result of the inadvertent disclosure to Mr. Sellathurai of three documents that contained privileged information. In all other respects, the appeal is dismissed.

[18] It is clear from paragraph 60 of the reasons of this Court that it had reached no conclusion as to whether fairness required the appointment of an *amicus curiae*, whether the redactions should be reduced, or whether Mr. Sellathurai's counsel should be permitted to make some limited use of the information subject to national security privilege. All of those questions remained open for determination by the judge on the rehearing.

[19] Justice Snider conducted the rehearing. She made an order dated January 13, 2012 precluding any disclosure of the redacted information to Mr. Sellathurai, and any use of the redacted information by him.

[20] Justice Snider did not give separate reasons for her order. However, in the order itself she stated her conclusion that the principles of procedural fairness as a result of the inadvertent disclosure of the privileged information did not require any remedy. She also stated that she had reviewed the Disputed Documents in their unredacted form, as well as the affidavit submitted by the Crown in relation to the redactions, and that she had considered the following factors:

a) Counsel for Mr. Sellathurai would have considerable difficulty in recalling the redacted information, which she had seen some time ago.

b) At the rehearing, counsel for Mr. Sellathurai made no submissions on fairness but rather focused on why certain of the redacted information should not be subject to national security privilege.

c) At the hearing of the original motion, the fairness argument for Mr. Sellathurai was that reviewing the Distorted Documents with the redactions leaves a distorted impression of the case against Mr. Sellathurai.

d) The impression conveyed by the redacted and unredacted versions is the same. The redactions merely disclosed some details. Withholding the redacted information from Mr. Sellathurai does not prevent him from knowing the case against him or from making full submissions on the judicial review.

[21] Mr. Sellathurai has now appealed the January 13, 2012 order of Justice Snider. The grounds of appeal are as follows: (a) Justice Snider should have considered and dealt with the submissions of Mr. Sellathurai that the redactions should be reduced, (b) Justice Snider erred in concluding that fairness did not require disclosure of the redactions or their limited use by Mr. Sellathurai, and (c) Justice Snider erred in failing to provide Mr. Sellathurai an adequate remedy in respect of addressing the redactions.

[22] It is argued for Mr. Sellathurai that the order under appeal is fatally flawed because Justice Snider thought that the Disputed Documents were relevant to the judicial review application pending before the Federal Court (Mr. Sellathurai's challenge to the decision of the Immigration

Decision not to adjourn the second part of the admissibility hearing). In fact, the Disputed Documents are relevant to Mr. Sellathurai's application for Ministerial relief under subsection 34(2) of the *Immigration and Refugee Protection Act*. In that proceeding, the Minister must determine whether he is satisfied that Mr. Sellathurai's presence in Canada would not be detrimental to the national interest. I accept that the allegations of a present or past relationship between Mr. Sellathurai and the LTTE will be of concern to the Minister when considering that question.

[23] I agree with counsel for Mr. Sellathurai that Justice Snider misdescribed the proceeding in respect of which the Disputed Documents were provided to Mr. Sellathurai. However, I am not persuaded that this error is serious enough to warrant appellate intervention. That is because, as I read the order under appeal, Justice Snider appreciated the critical point about the potential relevance of the Disputed Documents, which is that they speak to the basis of the CBSA's allegations as to Mr. Sellathurai's involvement with or connection to the LTTE. That is why Justice Snider made a point of considering whether Mr. Sellathurai's ability to challenge the "case against him" – which I understand to mean his alleged involvement with or connection to the LTTE – would be hampered if he were unable to make use of the redacted information.

[24] My colleagues and I have reviewed, as Justice Snider did, the redacted and unredacted versions of the Disputed Documents. I have concluded that it was reasonably open to Justice Snider to find that both versions convey substantially the same impression of the relationship between Mr. Sellathurai and the LTTE, as perceived by CSIS. Similarly, I have concluded that it was reasonably open to Justice Snider to conclude that the redactions state only details of allegations already known

to Mr. Sellathurai, and that despite the redactions, Mr. Sellathurai is or ought to be substantially aware of the case against him.

[25] I have not ignored the sealed submissions of counsel for Mr. Sellathurai that certain facts adverted to in the redactions have already been publicly disclosed by the Crown, because they were part of the evidence presented by the Crown in proceedings before the Immigration Division on May 19, 1999. That evidence relates to the issue of whether Mr. Sellathurai had raised money for the LTTE, whether he had participated in the purchase of a remote control toy, and whether he was involved in a radio program for the World Tamil Movement. Although Justice Snider did not expressly refer to this sealed submission, she stated that she had considered all submissions. I must assume that she did so, there being no basis for concluding the contrary. I infer that Justice Snider did not accept this submission as a basis for ordering any change to the redactions in the Disputed Documents. In my view, that conclusion was reasonably open to her on the record.

[26] I can discern no error of law or principle in the conclusion of Justice Snider that fairness does not require further disclosure of the redacted portions of the Disputed Documents, or her conclusion that fairness does not require that Mr. Sellathurai be permitted to make limited use of the redacted information. Since those conclusions leave no potential role for an *amicus curiae*, it follows that Justice Snider did not err in declining to appoint an *amicus curiae*.

[27] I would add, in respect of Mr. Sellathurai's application for Ministerial relief, that despite the redactions in the Disputed Documents, it is and always has been open to Mr. Sellathurai to

present evidence and submissions to the Minister on anything that can be demonstrated to have been publicly disclosed in the proceedings before the Immigration Division. There may come a point where the Crown may consider taking proceedings under section 38 of the *Evidence Act*, R.S.C. 1985, c. C-5, but that issue does not arise in this appeal.

[28] For these reasons, I would dismiss this appeal.

"K. Sharlow"

J.A.

"I agree
Eleanor R. Dawson"

"I agree
Johanne Trudel"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-33-12
(APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE SNIDER OF THE FEDERAL COURT OF CANADA, DATED JANUARY 13, 2012 (DOCKET NO. IMM-152-09))	
STYLE OF CAUSE:	CHANTHIRAKUMAR SELLATHURAI v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 22, 2012
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	DAWSON, TRUDEL JJ.A.
DATED:	November 19, 2012

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