Federal Court  Cour fédérale

Date: 20090521

Docket: IMM-3939-08

Citation: 2009 FC 513

Ottawa, Ontario, this 21st day of May 2009

Present: The Honourable Orville Frenette

BETWEEN:

Kaladevi BAGEERATHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") of a decision made by an immigration officer at the High Commission of Canada in Colombo, Sri Lanka (the "Visa Post") rejecting the applicant's application for her husband to be granted permanent residence.

The Facts

[2] The applicant is a young Tamil woman from northern Sri Lanka, who fled the war raging there to come to Canada in 2003, together with her son. They claimed refugee status, and were determined Convention refugees in the same year. She applied for permanent residence for herself, her child, and for her husband, Mr. Pageerathan Subramanian - who remains in Sri Lanka - in November 2003.

[3] Although the Act provides for concurrent processing of permanent residence applications made by accepted refugees and their spouses - to facilitate family reunification - the applicant and her child were granted permanent residence in September 2005, but her husband was not.

[4] Her husband's processing remained delayed until she applied to this Court for an order of *mandamus*.

[5] Leave was granted, and the Court was to hear the *mandamus* application; however before the hearing the respondent advised the Court that: "An alternate remedy exists in the form of a Temporary Resident Visa ("TRV"). A TRV would allow the applicant to be reunited (albeit not on a permanent basis) with his family here in Canada." This was argued to dissuade the Court from granting an order of *mandamus*.

[6] Justice Michael L. Phelan heard oral submissions and decided, based on the respondent's statement that because "there may be an alternate solution to this case", the hearing should be adjourned until the respondent could advise the Court "with respect to the issuance of a temporary

resident's visa and in Canada processing of the sponsorship application so as to permit the reunification of the sponsored father with his 6-year-old son and wife." The Court gave the respondent one week to confirm this.

[7] The respondent's argument that the applicant's husband could have asked for a temporary visa turned out to be unreliable. Once pressed to give a firm answer the respondent stated that: "The Minister cannot assure the Court that the Applicant would qualify for the issuance of a temporary resident visa."

[8] The Court heard the *mandamus* application and granted it. The respondent was given 90 days (until August 5, 2008) to decide the permanent residence application the applicant had made for her husband.

[9] In his decision dated May 13, 2008, Justice Phelan described the Visa Post's conduct as an example of "bureaucratic paralysis". The Court noted that the applicable statutory provisions contain "mandatory language", citing section 141 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, (the "Regulations") in particular. The Court held that this case "is a disturbing instance of inaction made more egregious by the furthering of the delay during the judicial review process" and concluded:

> [25] The Court has issued an Order requiring the Respondent to make a determination of the application within 90 days. The Court has retained jurisdiction to deal with any issues which may arise that affect the mandatory order.
>
> [26] The Court expects that, barring some unusual circumstances, the Respondent will grant the application prior to the deadline.

> Further unjustified delay could be contempt of this Court and could lead to penalties and costs.

[10] On May 29, 2008, the applicant's husband fled from Sri Lanka to India, as he claimed he feared for his life.

[11] The Visa Post official in charge of the file, Mr. Robert Stevenson, who was then Visa Post's First Secretary, Immigration, (the "First Secretary") rejected the applicant's request that his file be transferred from Sri Lanka to India stating:

> . . . per R11 of IRPA Regulations, Mr. Subramaniam does not meet the criteria for having his application processed by our High Commission in New Delhi, so I am not prepared to transfer his application there. Given the above, I must insist that Mr. Subramaniam appears for interview in Colombo. Should he choose not to do so, I will make an admissibility decision based on the information I have before me.

[12] Mr. Stevenson subsequently refused to carry out an admissibility interview by teleconference. He provided the applicant's counsel with a letter threatening that should the applicant's husband fail to attend in person "FOR ANY REASON, your application may be refused without notice".

[13] The applicant brought a motion before Justice Phelan, asking the respondent be directed to transfer the file to its office in India, and seeking prohibition against Mr. Stevenson making a decision without interviewing the applicant's husband.

[14] On July 21, 2008, the Court refused to intervene finding that “any errors in the processing of the permanent residence application can be addressed in a judicial review of any refusal to approve including issues of bad faith by the visa officer and the ability of a directed decision”.

[15] The Visa Post remained, therefore, under the Court’s order to make a decision by August 5, 2008.

[16] The applicant’s lawyer asked that the First Secretary change his mind, both with respect to his mention of rejecting the file “without notice”, and with respect to his refusal to interview the applicant’s husband by phone or videoconference. He also noted that: “As the Federal Court is still seized of this, and we have to report back to the Court, I suggest you communicate your decision to the Department of Justice and to me.”

[17] On August 4, 2008, the First Secretary rejected the application “without notice”, on the basis that the applicant’s husband “failed to appear for the interview.”

[18] Although the First Secretary heard that the applicant’s husband had left Sri Lanka, and knew his current address in India, he addressed his decision to a rooming house in Colombo where the applicant’s husband used to live. He did not purport to address a copy to the applicant, the applicant’s lawyer, the respondent’s lawyer or the Court.

[19] The applicant’s lawyer asked, after the August 5 deadline had passed, for a copy of any decision. The respondent’s counsel stated that a decision had been made and mailed to the

applicant's lawyer, but that the Visa Post would not disclose what the decision was - even to the respondent's counsel. After three weeks, when the applicant's counsel threatened to apply for an order of contempt, the respondent's counsel persuaded the Visa Post to send a copy of the decision by fax.

The Impugned Decision

[20] The First Secretary, by letter dated August 4, 2008, refused the applicant's husband's application for a permanent resident visa for the motive that he failed to attend a scheduled interview - indicating that: "I have reviewed your reasons for not attending, and I do not find them warranting the offer of further interview times."

[21] He also noted in his decision that: "Following an examination of the material that was available, I am not satisfied that you are admissible and that you meet the requirements of the Act. I am therefore refusing your application pursuant to subsection 11(1)."

The Issues

[22] The applicant raises two issues in this case:

> 1. Whether the First Secretary misconstrued the statutory basis for his jurisdiction, or otherwise erred in law in arriving at his decision?
>
> 2. Whether the First Secretary violated natural justice or acted in bad faith?

The Standard of Review

[23] The jurisprudence has established that the standard of review for the assessment of findings of facts or mixed facts and law, is one of reasonableness. In questions of law, the standard is one of correctness (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190). Deference is to be granted to decisions of administrative tribunals on questions of facts (*Minister of Citizenship and Immigration v. Khosa*, 2009 SCC 12).

[24] The Supreme Court of Canada in *Dunsmuir*, *supra*, stated at paragraph 47:

> . . . In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[25] Breaches of the rules of natural justice or of procedural fairness are governed by the standard of review of correctness (*Juste v. Minister of Citizenship and Immigration*, 2008 FC 670, paragraphs 23 and 24; *Bielecki v. Minister of Citizenship and Immigration*, 2008 FC 442, paragraph 28; *Hasan v. Minister of Citizenship and Immigration*, 2008 FC 1069, paragraph 8).

Analysis

[26] Regarding the first issue, the applicant contends that even before the First Secretary issued his decision it was a foregone conclusion that he was erring in law. He had decided, under section 11 of the Regulations, that he had jurisdiction to keep the file in Sri Lanka, and that there was a statutory presumption against letting the applicant's husband present himself to any other Visa Post.

[27] The applicant claims that the First Secretary presumed incorrectly that the application should be processed as if it were an ordinary immigrant visa application. He presumed incorrectly that this gives him jurisdiction to apply a statutory presumption that the file cannot be transferred to another office.

[28] I believe that the reasons and the justifications given by the First Secretary for refusing to allow the file to be transferred and refusing to interview the applicant's husband by telephone or videoconference were debatable. The former claimed to have special expertise in deciding the admissibility of Sri Lankans, making it unacceptable that an immigration officer in India should make the decision. The admissibility of Sri Lankans to Canada is routinely decided by offices other than the Visa Post in Sri Lanka. Any Sri Lankan residing outside Sri Lanka can apply to the office in the region he resides in. Moreover, under paragraph 176(2)(*a*) of the Regulations, a Convention refugee's spouse can present himself at any immigration office in the world. Every single Sri Lankan who has applied for permanent residence within Canada (as an accepted Convention refugee, on humanitarian grounds or in an inland spousal sponsorship) is assessed by an officer in Canada.

[29] I also find the First Secretary's determination to retain decision-making authority to be illogical, as nothing prevented him from sharing any legitimate admissibility concerns he had with his counterparts in New Delhi. Moreover, his refusal to interview the applicant's husband by phone or videoconference was also unreasonable and perverse. The applicant's husband could presumably have been interviewed by the First Secretary via telephone or videoconference at the embassy in

India. In deciding as he did, the First Secretary assumed there were no options when in reality other alternatives were available to him in these particular circumstances.

[30] The First Secretary's finding that the applicant's husband was merely "uncomfortable with the current situation in Sri Lanka . . . as are many citizens" is in my opinion, illogical and without regard to the evidence before him. The applicant's husband was not merely uncomfortable with a general situation, applicable to all citizens of Sri Lanka; he belongs to a particular social group at particular risk of being abducted, tortured, or murdered. This was taking place in a context where young Tamil men, like him and his friends, are routinely being abducted and tortured or murdered in Colombo. The murder of his friend was reported in the news, and a published news report confirms it took place near the residential address already on file for the applicant.

[31] Recognizing the particular circumstances in this case and the significant length of time this family has been apart I believe that the First Secretary's refusal to either move the file, the location of the interview, or modify how the interview was to be conducted, was without regard to the nature and weight of the rights at stake in the application. Is it hard to imagine how Canada's international law obligation to Convention refugees, or the applicant's rights under section 7 of the *Canadian Charter of Rights and Freedoms*, are met by an officer insisting that a refugee's spouse has to put his life in danger to attend an admissibility interview that could be conducted by other means.

[32] Regarding the second issue, the applicant submits that the First Secretary unjustly refused to disclose his admissibility concerns and refused his lawyer's request to respond to such concerns.

[33] Justice Phelan observed that the applicant can make submissions with respect to whether the First Secretary acted in bad faith. The context in which this finding was made is as follows: the applicant's submissions on the motion relating to the First Secretary's threat are included at pages 166 to 177 of the Applicant's Application Record. Bad faith was not pleaded; however, the Court, after reviewing the motion record, held that even if it did not consider that it had jurisdiction to grant the motion, it could indicate that "bad faith by the visa officer and the ability of a directed decision" could be brought to the Court's attention in a judicial review application, should the First Secretary follow through with his threat.

[34] The respondent in the present case delayed processing of the sponsorship application for several years. The justifications given for delay were generally contrived, and the Court found as much. The Court clearly indicated its expectations that, as the record indicated no cause for an inadmissibility concern, the applicant's husband should likely be granted a visa. Once the First Secretary was required to make a decision, he was faced with a request that was reasonable - given the human rights situations in Sri Lanka and the concerns the applicant had consistently expressed for her husband's safety throughout the litigation. The First Secretary not only misconceived the relevant statutory provisions, he showed no concern about this when his error was pointed out. The error is fundamental, as it expresses disregard for the purpose of the statute. It intersects with his refusal to budge on demanding that a Convention refugee's spouse physically return to his country of nationality to be interviewed in person.

The Remedies

Directed Decision

[35] The applicant submits that if her application is granted, because of “bureaucratic paralysis” or bad faith on the part of the First Secretary, she should be entitled to a “directed decision” or at least to a “specific decision”, to compensate for her unfair treatment. She argues that the excessive delay of seven years to process an application for a man whose wife and child have already obtained refugee status and permanent residence in Canada since 2003, is eminently unjust.

[36] The applicant adds that any additional delay would compound the injustice and therefore she suggests that this unfair situation justifies the Court to render a “directed decision” ordering the new panel to render its decision within a fixed delay, or as was done in *Tran v. Minister of Citizenship and Immigration*, 2007 FC 806, to order a judicial review instructing the new officer to grant the humanitarian and compassionate application (see also *Turanskaya v. Minister of Citizenship and Immigration*, [1997] F.C.J. No. 254 (F.C.A.) (QL)).

[37] The respondent does not contest that subsection 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, authorizes this type of order but argues that the jurisprudence justifies the issuance of specific instructions only in very limited extraordinary circumstances (*Rafuse v. Pension Appeals Board*, 2002 FCA 31; *Johnson v. Minister of Citizenship and Immigration*, 2005 FC 1262; *Ali v. Canada (M.C.I.)*, [1994] 3 F.C. 73 (T.D.), paragraph 18).

[38] An analysis of the facts of this case, the excessive delays incurred and the lack of comprehension and cooperation shown by the First Secretary and his obstinacy constitute, in my opinion, such an extraordinary situation which justifies this order.

Costs

[39] The applicant submits that the case is one which justifies this Court to award costs against the respondent. She relies upon the decision of *Manivannan v. Minister of Citizenship and Immigration*, 2008 FC 1392, where an award of $2,000.00 was given "for party-party costs" because "[t]he file was handled by different officers and has been mired in delay. Errors have occurred that have just not been explained". Justice Russell stating he had not seen evidence of bad faith in that file, the demand for a lump sum award of $4,000.00 was reduced to $2,000.

[40] The respondent opposes the demand based upon section 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/2002-232, which requires special reasons to award costs. Special reasons include unnecessary and unreasonably prolongation of proceedings (*Singh v. Minister of Citizenship and Immigration*, 2005 FC 544; *Johnson*, *supra*, at paragraph 26; *Cortes v. Minister of Citizenship and Immigration*, 2008 FC 642).

[41] In the present case, applicant's counsel has affirmed that he has acted *pro bono* for the instant judicial review because the parties do not have the financial capability to pay.

[42] In a civil case decided by the Ontario Court of Appeal, an award of costs set at $4,500.00, was granted to a counsel who had acted *pro bono* (*1465778 Ontario Inc. et al. v. 1122077 Canada Ltd. et al.* (2006), 82 O.R. (3d) 757).

[43] An examination of the file reveals an excessive delay in processing this matter due to the First Secretary in Colombo's lack of sensitivity to the situation of a Tamil who feared returning to

Sri Lanka and being killed in a war. A *mandamus* was issued on May 7, 2008 ordering the respondent to process this matter within 90 days. This was not done. Seven days later the officer reviewed the file and raised concerns which he had refused to raise with the applicant or her counsel before and required a in-person interview instead of an interview by videoconference or by telephone.

[44] I believe this is a special case which justifies the awarding of costs. In effect, the officer has circumvented a direct Court order which requires a sanction.

[45] In *Manivannan, supra,* counsel for the applicant sought a lump sum award for costs of $4,000.00; Justice Russell fixed them at $2,000.00. In the present case, counsel is asking for $10,000.00; I believe a sum of $3,000.00 should be awarded.

Conclusion

[46] For all of these reasons, this application for judicial review will be granted.

JUDGMENT

THE COURT ORDERS THAT:

1. The application for judicial review of the decision of Robert Stevenson, Second Secretary (Immigration) of the High Commission of Canada in Colombo, Sri Lanka, dated August 4, 2008, is granted.
2. This file is transferred to the Canadian High Commission office in New Delhi, India for processing.
3. The application is to be re-determined by a different officer within ninety (90) days of this Judgment; who is hereby directed to grant the applicant's husband permanent residence in Canada.
4. The sum of three thousand dollars ($3,000.00) as costs is awarded to the applicant against the respondent.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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