F ederal Court of A ppeal

CANADA

Cour d'appel fédérale

Date: 20100915

Docket: A-308-09

Citation: 2010 FCA 230

CORAM: **BLAIS C.J.**
NADON J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

KAMADCHY SUNDARESWARAIVE GURUMOORTHI KURUKKAL

Respondent

and

CANADIAN COUNCIL FOR REFUGEES

Intervener

Heard at Toronto, Ontario, on September 15, 2010.

Judgment delivered from the Bench at Toronto, Ontario, on September 15, 2010.

REASONS FOR JUDGMENT OF THE COURT BY: LAYDEN-STEVENSON J.A.

Date: 20100915

Docket: A-308-09

Citation: 2010 FCA 230

CORAM: **BLAIS C.J.**
NADON J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

KAMADCHY SUNDARESWARAIVE GURUMOORTHI KURUKKAL

Respondent

and

CANADIAN COUNCIL FOR REFUGEES

Intervener

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on September 15, 2010)

LAYDEN-STEVENSON J.A.

[1] The Minister of Citizenship and Immigration (the Minister) appeals from the judgment of Mactavish J. of the Federal Court (the judge). The judge allowed the respondent's application for

judicial review of the decision of an immigration officer dated January 9, 2008 and certified the following question:

> Once a decision has been rendered in relation to an application for a humanitarian and compassionate exemption, is the ability of the decision-maker to reopen or reconsider the application on the basis of further evidence provided by an applicant limited by the doctrine of *functus officio*?

The judge answered the question in the negative. Her reasons for judgment are reported at 347 F.T.R. 60; 81 Imm. L.R. (3d) 263; 2009 FC 695.

[2] The respondent's application under section 25 of the *Immigration and Refugee Protection Act*, S.C. 2000, c. 27 for relief on humanitarian and compassionate grounds, from the requirement to apply for permanent residence from outside Canada, was refused on November 26, 2007 and communicated to the respondent in person on December 14, 2007. By letter dated December 18, 2007, received by the Minister on December 28, 2007, the respondent asked for a reconsideration of the negative decision. In correspondence dated January 9, 2008, an immigration officer refused the request for reconsideration on the basis that the principle of *functus officio* "means that once a decision is taken, the decision-maker has no more authority on the matter." The respondent successfully applied for judicial review of the decision refusing the request for reconsideration. The judge concluded that the doctrine of *functus officio* did not preclude the immigration officer from reconsidering the matter. It is the latter decision that is the subject of this appeal.

[3] We agree with the judge that the principle of *functus officio* does not strictly apply in non-adjudicative administrative proceedings and that, in appropriate circumstances, discretion does exist

to enable an administrative decision-maker to reconsider his or her decision. The Minister and the Intervener agreed in this regard on this appeal (Minister's memorandum of fact and law at paragraphs 1, 24-26; Intervener's memorandum of fact and law at paragraphs 24, 25, 33, 36, 47). However, in our view, a definitive list of the specific circumstances in which a decision-maker has such discretion to reconsider is neither necessary nor advisable.

[4] In this case, the decision-maker failed to recognize the existence of any discretion. Therein lay the error. The immigration officer was not barred from reconsidering the decision on the basis of *functus officio* and was free to exercise discretion to reconsider, or refuse to reconsider, the respondent's request.

[5] The judge directed the immigration officer to consider the new evidence and to decide what, if any, weight should be attributed to it. In our view, that direction was improper. While the judge correctly concluded that the principle of *functus officio* does not bar a reconsideration of the negative section 25 determination, the immigration officer's obligation, at this stage, is to consider, taking into account all relevant circumstances, whether to exercise the discretion to reconsider.

[6] Accordingly, the appeal is allowed in part. The Federal Court judgment is set aside. Rendering the judgment that ought to have been made, the application for judicial review is allowed and the matter is remitted to an immigration officer for reconsideration in accordance with these reasons. The certified question is answered in the negative.

"Carolyn Layden-Stevenson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-308-09

(APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE MACTAVISH IN THE FEDERAL COURT, DATED JULY 3, 2009, IN DOCKET NO. IMM-309-08)

STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. KAMADCHY SUNDARESWARAIVE GURUMOORTHI KURUKKAL v. CANADIAN COUNCIL FOR REFUGEES
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 15, 2010
REASONS FOR JUDGMENT OF THE COURT BY:	(BLAIS C.J., NADON J.A., AND LAYDEN-STEVENSON J.A.)
DELIVERED FROM THE BENCH BY:	LAYDEN-STEVENSON J.A.

APPEARANCES:

John Loncar Eleanor Elstub	FOR THE APPELLANT
No appearance	FOR THE RESPONDENT (Self-Represented)
Angus Grant Aviva Basman	FOR THE INTERVENER

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE APPELLANT
N/A	FOR THE RESPONDENT
Refugee Law Office Toronto, Ontario	FOR THE INTERVENER