Date: 20050822

Docket: IMM-5617-04

Citation: 2005 FC 1122

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applic

ant

- and -

NOEL HARSHANA MANOHARAN

Responde

nt

REASONS FOR ORDER

GIBSON J.

INTRODUCTION

[1] These reasons follow the hearing of an application for judicial review of a decision of the Refugee Protection Division ("RPD") of the Immigration and Refugee Board wherein the RPD determined the Respondent to be a Convention refugee within the meaning assigned to that expression by section 96 of the *Immigration and Refugee Protection Act*[1]. The decision under review is dated the 19th of May, 2004.

BACKGROUND

[2] The Respondent was born on the 14th of April, 1984 in Colombo, Sri Lanka. He remains a citizen of Sri Lanka. He is a Tamil and a Christian.

[3] The Respondent moved with his parents to Germany in 1985 when he was one (1) year old. He lived in Germany until 1999. In June of 1999, he travelled with his mother to Sri Lanka. He and his mother returned to Germany in July of 1999. In October of 1999, the Respondent and his mother again left Germany and travelled to the United States. They arrived in Canada from the United States in November of 1999 when the Respondent was fifteen (15) years of age. They claimed Convention refugee status.

[4] The technical history of the long sojourn of the Respondent and his mother in Germany is described in a letter from an official in the Embassy of the Federal Republic of Germany in Ottawa, dated the 24th of October, 2000. The substance of that letter is in the following terms:

Both persons [the Respondent and his mother] were registered in Germany from July 4, 1985 until October 20, 1999. After they arrived in Germany in 1985 they applied for asylum. In 1994 they withdrew their application for asylum and on December 5, 1994, a residence title for exceptional circumstances ... was issued for Mrs. Manoharan and her son. Since

October 13, 1998 Mrs. Manoharan was holding an unlimited residence permit, her son Noel received his on April 14, 2000. When she received the unlimited residence permit, Mrs. Manoharan was holding a valid Sri Lankan passport ... issued by the Embassy of Sri Lanka in Bonn on Octoner 10, 1994, valid until October 10, 1999. The child was inscribed in this passport.

Since October 20, 1999, Mrs. Manoharan and her son's registration with the inhabitants register was cancelled with the remark, "moved abroad".

Since Mrs. Manoharan and her son have left Germany for more than six months now without having applied for a returning resident's permit, their unlimited residence permit is void[2].

[one word in German and the passport number, omitted].

[5] It was not in dispute before the Court that the Respondent and his mother fled Germany to escape abuse at the hands of their father and spouse, respectively.

[6] The Convention refugee claim of the Respondent and his mother came before the Refugee Division of the Immigration and Refugee Board on the 12th of October, 2000, the 10th of January, 2002 and the 30th of April, 2002. Counsel for the Minister of Citizenship and Immigration appeared before the Refugee Division to urge that the Respondent and his mother were excluded from being found to be Convention refugees at the relevant time by virtue of section E of article 1 of the *United Nations Convention Relating to the Status of Refugees*[3] which was, at the relevant time, scheduled to the *Immigration Act*[4], then the relevant law, and the interaction of that section with the definition "Convention refugee" in subsection 2(1) of the *Immigration Act*. Section E of article 1, as it appeared in the schedule to the *Immigration Act*, is in the following terms:

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.	E. Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.

[7] The decision of the Refugee Division[5] issued on the 7th of August, 2002. With regard to exclusion, the Refugee Division concluded:

(...) the claimants [that is to say the Respondent herein and his mother], having left Germany in October 1999 (almost three years ago), they are well passed [sic] the "longer than six months and less than 12 months" date, when they would have been given the opportunity to provide evidence to the German authorities that they have not abandoned Germany. There is no evidence, documentary or viva voce, that the German authorities would, at this time, restore to the claimants their rights as residents of Germany, which is [sic] now void. The panel, therefore, determines that Article 1E does not apply to the claim before us.

Thus, the Refugee Division found the "relevant date" for determining whether the Respondent and his mother were excluded to be the date of its decision. Much will turn on this conclusion later in these reasons.

[8] Having found the Respondent and his mother not to be excluded from Convention refugee status, the Refugee Division went on to consider whether they were "included", that is to say whether, under Canadian law, they were Convention refugees. The Refugee Division

concluded its analysis in the following terms:

... after considering all of the evidence, the panel determines that the claimant [that is to say the Respondent's mother] does not have a well-founded fear of persecution, and that there is no more than a mere possibility that the claimants would be persecuted if they were to return to Sri Lanka today.

Having determined that the claimants provided little, credible evidence about their recent, personal circumstances in Sri Lanka, and finding that the claimant does not have a well-founded fear in Colombo, Sri Landa today, the Refugee Division determines that Indraini Thabita Manoharan [the Respondent's mother] and Noel Harshana Manoharan, are not Convention refugees.

[9] The Respondent and his mother sought judicial review before this Court of the Refugee Division decision. Leave for judicial review was granted and the judicial review hearing was held before my colleague Justice Simpson on the 3rd of July, 2003. The issue of "exclusion" was not before Justice Simpson, notwithstanding the fact that counsel for the Minister of Citizenship and Immigration appearing before her was satisfied that the Refugee Division had erred in its determination of the "relevant date" for application of the exclusion rule. Before me, counsel for the Applicant reasoned that it was completely unnecessary for the Minister to raise the issue of the relevant date for determination of exclusion since the impact of the decision then under review would produce the same impact as would exclusion, that is to say, the Respondent and his mother would eventually be removed to Sri Lanka.

[10] Justice Simpson, in her reasons[6], nonetheless very briefly referred to the issue of exclusion. She wrote at paragraph 2 of her reasons:

The Applicants are citizens of Sri Lanka who resided in Germany from July 1985 to October 1999. However, they no longer have legal status in Germany. ...

Thus, implicitly at least, Justice Simpson endorsed the exclusion conclusion of the Refugee Division, without reference to the Division's conclusion regarding the relevant date for determination of whether the Article 1E exclusion rule applied.

[11] Justice Simpson described and dealt with the separate issues regarding the Minor Claimant before her, that is to say the Respondent in this matter, in the following terms:

The Applicants argue that the Board failed to address the Minor Claimant's distinct claim as a young Tamil male who would be subject to persecution in Sri Lanka at the hands of the LTTE and the Sri Lankan Army. The Respondent submits, that because the Minor Claimant did not file his own narrative and because his claim is tied to the Applicants' presence in Sri Lanka in 1999, the negative credibility findings against the Adult Claimant defeat both their claims.

In my opinion, the Board erred when it failed to make a separate determination about the risk to the Minor Claimant. The Board clearly identified that the Minor Claimant had separate grounds for his refugee claim but never addressed his distinct claim. This was a reviewable error with respect to the claim of the Minor Claimant.

In the result, Justice Simpson concluded in the following terms:

While the Board did commit a reviewable error with respect to the Minor Claimant's claim, it did not commit a reviewable error in its assessment of the testimony of the Adult Claimant. Consequently, the application with respect to the Adult Claimant will be dismissed and the application with respect to the minor Claimant will be referred back to the Board for redetermination.

[12] Thus, the stage was set for a redetermination of the Convention refugee claim of the Respondent in this matter.

THE DECISION UNDER REVIEW

[13] The Applicant on this judicial review, that is to say the Minister of Citizenship and Immigration, sought in advance of the reconsideration of the Respondent's Convention refugee claim, this time by the Refugee Protection Division of the Immigration and Refugee Board, to re-raise the issue of exclusion and, more particularly, the relevant date for determination of exclusion under Article 1E. Counsel for the Applicant filed written submissions. The rehearing came on before the Refugee Protection Division on the 8th of April, 2004. Counsel for the Minister did not appear but counsel for the claimant, here the Respondent, raised the issue of the Minister's written submissions on exclusion. The presiding member of the Refugee Protection Division was adamant that the issue of exclusion was "off the table", that the only issues before her were "inclusion" issues, that is to say, whether or not the claimant was a Convention refugee or a person otherwise in need of Canada's protection[7]. As earlier noted, the RPD, in reasons dated the 19th of May, 2004, found the Respondent to be a Convention refugee as against Sri Lanka. Determinative factors were his age, his complete lack of familiarity with the realities of life in Sri Lanka or, put another way, his vulnerability, his ethnicity and his lack of family or other support in Sri Lanka.

THE ISSUES

[14] The Minister of Citizenship and Immigration brings this application for judicial review to, in effect, challenge the determination by the Refugee Division, on the Respondent's first Convention refugee hearing, together with his mother, as to the relevant date for determination of exclusion under Article 1E. More particularly, the Minister of Citizenship and Immigration challenges the denial to him of the opportunity to pursue the issue of the relevant date for determination of exclusion under Article 1E of the Convention on the Respondent's second Convention refugee hearing that took place before the Refugee Protection Division.

[15] Counsel for the Respondent, the applicant for Convention refugee protection, responds that the issue of relevant date, as between the Minister and the Respondent, was issue estopped by the time of the Respondent's second hearing and that therefore the Refugee Protection Division made no reviewable error in categorically refusing to consider the written representations on behalf of the Minister that were before her.

[16] Significantly, the conclusion of the Refugee Protection Division on inclusion, that is to say that, if the Respondent is not excluded, then he is a Convention refugee in his claim against removal to Sri Lanka, is not, I conclude following the hearing of this matter, seriously at issue.

ANALYSIS

a) Issue Estoppel - General Principles

[17] In *Danyluk v. Ainsworth Technologies Inc.*[8], Justice Binnie, for the Court, wrote at paragraph [33]:

The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party ... has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle* ... . If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied: ...

[citations omitted, emphasis in the original]

[18] The preconditions to the operation of issue estoppel are the following:

(1) that the same question has been decided;

(2) that the judicial decision which is said to create the estoppel was final; and

(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies[9].

[19] Counsel for the Respondent urged that the preconditions to the operation of issue estoppel were met. First, she urged, the question of the relevant date for determining exclusion had been decided by the Refugee Division. The decision in which the Refugee Division decided the question came before this Court. The Minister of Citizenship and Immigration chose not to seek review on the issue of relevant date. Thus, counsel urged, the decision of the Refugee Division on that issue and on the facts of this matter became a final decision. There certainly can be no difference of view on the proposition that the parties to that final decision were the same as the parties to the hearing before the Refugee Protection Division when the issue of "inclusion" was referred back and redetermined.

[20] I accept without reservation the urgings of counsel for the Respondent in this regard.

[21] But that is not the end of the matter. Notwithstanding that the preconditions to issue estoppel are met, there remains a discretion to rehear the issue "... to achieve fairness according to the circumstances of each case."[10] I have earlier noted that the member of the Refugee Protection Division who reheard the Respondent's claim for inclusion as a Convention refugee adamantly refused to reconsider the issue of exclusion and, more particularly, the relevant date for determination of whether exclusion applies. I am satisfied that the member was entitled to do so on the basis of issue estoppel but, in failing to cite reliance on issue estoppel, to examine the preconditions to the operation of issue estoppel on the facts of this matter and to then go on to determine whether or not discretion should nonetheless be exercised to hear the issue, the member of the Refugee Protection Division erred in principle[11].

[22] All the foregoing being said, the public interest in finality of litigation is here at issue. The Respondent has been before the Refugee Division and before this Court. He has been back before the successor to the Refugee Division and he is now back before this Court again. I am satisfied it is not in the public interest to set aside the decision under review and to once again direct the Refugee Protection Division to confront the issue of the Respondent's claim to Convention refugee status with that reconsideration extending to whether or not the Refugee Protection Division is issue estopped regarding the determination of the relevant date for an exclusion determination and, if so, whether it is nonetheless appropriate to reconsider that issue.

[23] The issue of relevant date has not, to this time, been explicitly addressed by this Court. Whether or not this Court is itself issue estopped by reason of the failure of counsel for the Minister of Citizenship and Immigration to raise the issue on the first opportunity before this Court, I think it is now appropriate that the issue be addressed here and I will exercise my discretion to do so.

b) Exclusion Under Article 1E

[24] In *Mahdi v. Canada (Minister of Citizenship and Immigration)*[12], the Federal Court of Appeal addressed the issue of the relevant date for determination of exclusion under Article 1E of the *Convention*. On the facts before it, Justice Pratte, for the Court, wrote at paragraph 12:

... The real question that the Board had to decide in this case was whether the Respondent was, when she applied for admission to Canada, a person who was still recognized by the competent authorities of the United States as a permanent resident of that country. ...

[emphasis added]

[25] In Canada (*Minister of Citizenship and Immigration*) *v. Choovak*[13], my colleague Justice Rouleau endorsed the question as framed in *Mahdi* in the following terms at paragraph 37 of his reasons:

I must admit I have difficulty with the respondent's submission since this would yield the manifestly absurd result that counsel may indefinitely postpone the hearing of a refugee claim so as to cause the residence status of the claimant to expire, thus rendering the exclusion clause of article 1E of the Convention inapplicable. Article 1E must be read in a more purposive light so as to provide safe haven to those who genuinely need it, not to give a quick and convenient route to landed status for immigrants who cannot or will not obtain it in the usual way. ...

[emphasis added]

[26] For ease of reference, I briefly restate here the underlying background to this matter. The Respondent was born in Colombo, Sri Lanka in mid April of 1984. At the age of one, he moved with his parents to Germany. He remained in Germany until the summer of 1999 when, at the age of fifteen, and in the company of his mother, he returned to Colombo. He testified that he and his mother lived in fear in Colombo. They returned to Germany within a month. In October of 1999, while still fifteen(15) years of age, in the company of his mother, he departed Germany for the United States. In November of the same year, he and his mother came to Canada from the United States and made Convention refugee claims. Both he and his mother had suffered abuse at the hands of his father and, in the case of his mother, her spouse, in Germany.

[27] In summary then, when the Respondent's mother determined to flee from abuse at the hands of her spouse, the Respondent was left with effectively no choice. He and his mother had determined that Sri Lanka was not a safe-haven. Neither was Germany a safe-haven for the Respondent since his choices there were to rely on his father who had been abusive towards him or to strike out on his own at the age of fifteen. He accompanied his mother. His mother chose Canada.

[28] The evidence before the Court indicates that, when the Respondent applied for admission to Canada, to paraphrase the words of article 1E of the *Convention*, he was a person who was recognized by the competent authorities of Germany as having the rights and obligations attached to the possession of the nationality of Germany. That being said, I do not read the words of the *Mahdi* decision as being absolute. I prefer an interpretation of those words that reflects the rationale provided by Justice Rouleau in the *Choovak* decision. While article 1E should be read in a manner that precludes the abuse of "jurisdiction shopping", it should also be read, in the words of Justice Rouleau, "... in a more purposive light so as to provide safe-haven to those who genuinely need it ...". Such a reading is consistent with the first objective stated in subsection 3(2) of the *Immigration and Refugee Protection Act*, which provides that among the objectives of that *Act* with respect to refugees [is] "... to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted". That objective was not a stated objective of Canadian Refugee law at the time of either the *Mahdi* or *Choovak* decisions, nor was it the law of Canada at the time of the "exclusion" decision in favour of the Respondent and his mother that is here sought to be reviewed. That being said, on the very particular facts of this matter, I am satisfied that the "exclusion" decision in favour of the Respondent and his mother was correct and that the *Mahdi* decision is distinguishable by reason of the different factual background that was there at issue and of the newly stated statutory objective just referred to.

(c) The Inclusion Determination

[29] In written materials filed on behalf of the Applicant, it is urged that the Refugee Protection Division erred in a reviewable manner in determining the Respondent to be a Convention refugee by perversely and capriciously finding that the Respondent would be at risk in Sri Lanka and by mis-stating the test for Convention refugee status. I have noted earlier in these reasons that neither of the foregoing issues was strongly pursued on the hearing of this application for judicial review.

[30] Against a standard of review of patent unreasonableness in respect of the alleged perverse and capricious findings of the Refugee Protection Division, I find no reviewable error. Further, I am satisfied that the Refugee Protection Division did not mis-state the test for Convention refugee status.

CONCLUSION

[31] For the foregoing reasons, this application for judicial review will be dismissed.

CERTIFICATION OF A QUESTION

[32] Following the issuance of these Reasons, counsel will have ten (10) days to consider whether or not the decision herein raises a serious question of general importance for certification. Counsel should consult and advise the Court, in writing, of the result of their considerations in this regard. Thereafter, an Order will issue.

"Frederick E. Gibson"

J.F.C.

Ottawa, Ontario

August 22, 2005

FEDERAL COURT

Names of Counsel and Solicitors of Record

DOCKET: IMM-5617-04

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP & IMMIGRATION

Applicant

- and -

NOEL HARSHANA MANOHARAN Respondent

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: WEDNESDAY JUNE 8, 2005

REASONS FOR ORDER

BY: GIBSON, J.

DATED: AUGUST 22, 2005

APPEARANCES BY: Mr. Lorne McClenaghan

For the Applicant

Ms. Barbara Jackman

For the Respondent

SOLICITORS OF RECORD:

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For the Respondent

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[1] S.C. 201, c. 27.

[2] Tribunal Record, Volume 1, page 214.

[3] Signed at Geneva on July 28, 1951and the Protocol to that Convention signed at New York on January 31, 1967.

[4] R.S.C. 1985, c. I-2.

[5] Exhibit A to the affidavit of Patricia Vettraino filed the 17th of August, 2004, pages 3 to 15.

[6] *Manoharan v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1125 (QL).

[7] See Tribunal Record, Volume 3, pages 880 to 882.

[8] [2001] 2 S.C.R. 460.

[9] See *Danyluk, supra* at paragraph [25] citing Dickson J., as he then was, in *Angle v. Minister of National Revenue* [1975] 2 S.C.R. 248.

[10] See *Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 cited with approval in paragraph [63] of *Danyluk*, *supra,* note 8.

[11] See paragraphs [66] and [67] of *Danyluk, supra,* note 8.

[12] (1995), 191 N.R. 170 (F.C.A.).

[13] [2002] F.C.J. No. 767 (QL).