

**Date: 20060112**

**Docket: A-170-05**

**Citation: 2006 FCA 14**

**CORAM: DÉCARY J.A.**

**SEXTON J.A.**

**EVANS J.A.**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Appellant**

and

**KAILESHAN THANABALASINGHAM**

**Respondent**

Heard at Toronto, Ontario, on January 11, 2006.

Judgment delivered at Toronto, Ontario, on January 12, 2006.

**REASONS FOR JUDGMENT BY:**

**EVANS J.A.**

**CONCURRED IN BY:**

**DÉCARY J.A.**

**SEXTON J.A.**

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**REASONS FOR JUDGMENT**

**EVANS J.A.**

[1] Kaileshan Thanabalasingham, a citizen of Sri Lanka, entered Canada and was recognized as a refugee in 1991, on the ground that he had a well founded fear of persecution in Sri Lanka by virtue of his Tamil ethnicity.

[2] He was arrested in October 2001 in the course of enforcement action by the Toronto Police Force, and Citizenship and Immigration Canada, against members of Tamil criminal street gangs operating in Toronto. In February 2002, a deportation order was made against him on the basis of a conviction in 1998 for conspiracy to commit assault, an offence for which he had been sentenced to a little less than six months' imprisonment. Mr Thanabalasingham appealed to the Immigration Appeal Division of the Immigration and Refugee Board ("IAD") against the removal order, invoking the IAD's discretionary jurisdiction to stay the order on humanitarian and compassionate grounds, because, among other things, of the risk of torture to which he would be exposed if returned to Sri Lanka.

[3] Because Mr Thanabalasingham is a protected person, as a result of his status as a refugee, the Minister took the view that, even if the appeal to the IAD was unsuccessful, subsection 115(1) of the *Immigration and Refugee Protection Act* precluded his *refoulement* to Sri Lanka, in the absence of a Minister's opinion under subsection 115(2) that Mr Thanabalasingham constitutes a danger to the public in Canada. On March 14, 2003, the Minister's Delegate gave an opinion to this effect,

having concluded that the danger to the public posed by Mr Thanabalasingham if he is permitted to remain in Canada outweighed the risk that he might be tortured if removed to Sri Lanka.

[4] This is an appeal by the Minister of Citizenship and Immigration from a decision of a Federal Court Judge who granted an application for judicial review by Mr Thanabalasingham to set aside the danger opinion given by the Minister's Delegate: *Thanabalasingham v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 172.

[5] The Judge granted the application on the ground that the Delegate's assessment of risk was based solely on the evidence of country conditions in Sri Lanka and had no regard to the risk resulting from Mr Thanabalasingham's personal circumstances, and that her reasons did not adequately explain why she accepted the material submitted by the Minister and rejected that favourable to Mr Thanabalasingham.

[6] Counsel says that the Minister's principal concern in bringing this appeal is the Judge's decision to hear and grant the application for judicial review in the face of an admission by Mr Thanabalasingham during the IAD proceedings that he had knowingly made false representations in earlier proceedings to review his detention following his arrest in 2001. These misrepresentations, which minimize the seriousness of his criminal activity and deny his association with members of a Tamil criminal street gang in Toronto ("the VVT"), were also in the material before both the Delegate when she gave the danger opinion, and the Federal Court Judge who granted leave for Mr Thanabalasingham's application for judicial review to be heard.

[7] The Judge rejected the Minister's contention that the application for judicial review should be summarily dismissed on account of Mr Thanabalasingham's lies, since he might have established a *prima facie* risk of torture if returned to Sri Lanka. In exercising his discretion to consider the merits of the application, the Judge stated that he was taking into account the serious consequences to Mr Thanabalasingham if the danger opinion was allowed to stand, and the fact that the Supreme Court of Canada had stated in *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, that it would normally be a breach of section 7 of the Charter to remove someone to a country where there was a risk of torture.

[8] The Judge certified the following question for appeal:

When an applicant comes to the Court without clean hands on an application for judicial review, should the Court in determining whether to consider the merits of the application, consider the consequences that might befall the applicant if the application is not considered on its merits?

[9] In my view, the jurisprudence cited by the Minister does not support the proposition advanced in paragraph 23 of counsel's memorandum of fact and law that, "where it appears that an applicant has not come to the Court with clean hands, the Court must initially determine whether in fact the party has unclean hands, and if that is proven, the Court must refuse to hear or grant the application on its merits." Rather, the case law suggests that, if satisfied that an applicant has lied, or is otherwise guilty

of misconduct, a reviewing court may dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief.

[10] In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

[11] These factors are not intended to be exhaustive, nor are all necessarily relevant in every case. While this discretion must be exercised on a judicial basis, an appellate court should not lightly interfere with a judge's exercise of the broad discretion afforded by public law proceedings and remedies. Nonetheless, I have concluded in this case that the Judge erred in the exercise of his discretion by failing to take account of the remedy provided to Mr Thanabalasingham by his right to appeal to the IAD against his removal and the relevance of that appeal to an assessment of the consequences if the Minister's opinion stands.

[12] In Mr Thanabalasingham's appeal to the IAD, an independent tribunal which makes its decisions on the basis of a full adversarial-type hearing, he could, and did, argue that, among other things, the danger to the public in Canada posed by his criminal record and his alleged association with the VVT was outweighed by the threat of torture that he faced if removed to Sri Lanka. In other words, even if the Delegate's opinion was not set aside, Mr Thanabalasingham still had an opportunity to attempt to persuade the IAD that he should not be removed, and to reargue the same issues which had formed the basis of the Minister's opinion given by the Delegate.

[13] The appeal to the IAD was an adequate alternative remedy to protect Mr Thanabalasingham from being deported to torture. Since he could only be removed if and when the IAD dismissed his appeal because it found, among other things, that he was not at risk, the consequences of the Delegate's danger opinion were not as grave as the Judge appeared to think.

[14] Having identified a legal error in the Judge's exercise of his discretion (failing to take account of the alternative remedy and misapprehending the seriousness of the consequences of the danger opinion), this Court may substitute its exercise of discretion for that of the Judge.

[15] In this context, it is relevant to note that, in a decision dated January 6, 2006, and made available to counsel on January 10, the day before the hearing of this appeal, the IAD dismissed Mr Thanabalasingham's appeal, after a nine-day hearing that had commenced on April 6, 2004. The IAD made adverse findings in respect of Mr Thanabalasingham's criminal record and gang activities, and was not persuaded that he faced a substantial risk of torture if returned to Sri Lanka.

[16] The defects in the Delegate's danger opinion alleged by Mr Thanabalasingham would not, in all the circumstances of this case, including his lies, warrant setting the opinion aside and remitting it, with the possibility of further judicial reviews and delays. It is now four years since he was ordered deported. Justice is served by the fact that Mr Thanabalasingham has had a hearing on these issues before the IAD, whose decision he will no doubt seek to have reviewed in the Federal Court. If his challenge to the IAD decision fails, he may still adduce any material new facts to the Minister.

[17] For these reasons, I would allow the Minister's appeal, set aside the decision of the Federal Court, dismiss the application for judicial review, and restore the opinion of the Minister's Delegate, dated March 14, 2003. I would answer the certified question by saying that a consideration of the consequences of not determining the merits of an application for judicial review is within the Judge's overall discretion with respect to the hearing of the application and the grant of relief.

"John M. Evans"

J.A.

"I agree

Robert Décary"

"I agree

J. Edgar Sexton"

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-170-05

**STYLE OF CAUSE:** THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

Appellant

and

KAILESHAN THANABALASINGHAM

Respondent

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JANUARY 11, 2006

**REASONS FOR JUDGMENT:** EVANS J.A.

**CONCURRED IN BY:** DÉCARY J.A.

SEXTON J.A.

**DATED:** JANUARY 12, 2006

**APPEARANCES:**

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