Date: 20060620

Docket: IMM-3579-05

Citation: 2006 FC 750

BETWEEN:

PUVIRAJ THAMBITURAI,

307 Emil Street,

Laval, Quebec

H7N 4M3

Applicant

and

THE SOLICITOR GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

Pinard J.

[1] This is an application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the RPD) dated May 18, 2005 vacating the applicant's Convention refugee status.

I. Facts

[2] Puviraj Thambiturai (the applicant) arrived at the Port of Entry of Mirabel on March 23, 1993. He declared having left his country of citizenship, Sri Lanka, on March 19, 1993, having then travelled through Bangkok and London before arriving in Canada. He was not in possession of any travel document. He had a copy of his Driving Licence issued in February 1984. He was then residing in Colombo. He also had an Identity Card issued on July 30, 1992 in Colombo. On this document, his profession is "student".

[3] On April 5, 1993, the applicant presented his Personal Information Form (PIF) to the Immigration and Refugee Board (the IRB). On September 2, 1993, he was granted refugee status in Canada.

[4] On November 18, 1993, the applicant presented a Convention refugee application for permanent residence. He declared that he had a Sri Lankan passport valid until July 29, 1997.

[5] On December 10, 1994, the applicant became a permanent resident of Canada.

[6] After receiving an anonymous denunciation, Citizenship and Immigration Canada (CIC) launched an investigation. The RCMP informed CIC that Interpol France had identified the applicant on February 18 and 20, 1988 by fingerprints comparison. He had been identified because of a crime related to the drug legislation.

[7] On January 9, 1997, the applicant entered Canada at Mirabel Airport and was interviewed by two immigration officers. He denied having resided in France and having committed any crime in France. The applicant had presented a Sri Lankan passport valid from February 2, 1995, to February 9, 2000. He also presented a document from A.K.S. Pharmacy, his alleged employer in Sri Lanka. This document confirmed that he was employed from April 1990 to January 1993.

[8] CIC did receive court documents concerning the criminal charges the applicant had been indicted. These documents indicate that the latter was arrested in Paris on February 16, 1988 with other people in a deliberate act of trying to deal 720 grams and 560 grams of heroin. On September 26, 1989, he was found guilty of acquiring, possessing and trafficking in heroin, of associating or conspiring with a view to acquire, possess and traffic in and smuggling prohibited good, punishable under the "Code de la santé publique" and the "Code des douanes". He was sentenced to seven years imprisonment pursuant to section 464-1 of the "Code de procédure pénale", to pay jointly and severally the Customs administration the sum of 1.277.000 francs and to pay a fine of 2.554.000 francs. He was also to be banned from the French territory.

[9] The Minutes of a hearing before the Immigration Division on February 28, 2002, show that the applicant was questioned concerning the period that he remained in France after September 1989. His answer was "about three and a half years" but he could not remember the exact time or year that he left France.

[10] In a decision dated September 23, 2003, the Immigration Division found that the applicant is a person described in paragraph 36(1)(*c*) of the *Immigration and Refugee Protection Act*, that is, that he was inadmissible for serious criminality, and paragraph 40(1)(*a*), that is, that he was inadmissible to Canada because of misrepresentation. He was ordered deported. He appealed this decision before the Immigration Appeal Division (the IAD). The appeal has never been withdrawn, nor has it been heard on its merits.

[11] The applicant is now married to Shanti Rajaratnam, whom he sponsored after his marriage. Mrs. Thambiturai has now acquired her Canadian citizenship. From this union were born two Canadian-born children, who are Canadian citizens.

[12] On February 12, 2004, there was an application by the respondent, filed under section 109 of the *Immigration and Refugee Protection Act* in front of the RPD, to vacate the decision to allow the claim for refugee status.

[13] On May 18, 2005, the RPD allowed the application to vacate the applicant's refugee/protected person status. This decision is the subject of the present application for judicial review.

II. Pertinent Legislation

[14] The relevant provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the IRPA) are as follows:

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
[...]	[...]
(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	*c*) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.
40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation	40. (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(*a*) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	*a*) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
46. (1) A person loses permanent resident status	46. (1) Emportent perte du statut de résident permanent les faits suivants :
(*a*) when they become a Canadian citizen;	*a*) l'obtention de la citoyenneté canadienne;
(*b*) on a final determination of a decision made outside of Canada that they have failed to comply with the residency obligation under section 28;	*b*) la confirmation en dernier ressort du constat, hors du Canada, de manquement à l'obligation de résidence;
(*c*) when a removal order made against them comes into force; or	*c*) la prise d'effet de la mesure de renvoi;
(*d*) on a final determination under section 109 to vacate a decision to allow their claim for refugee protection or a final determination under subsection 114(3) to vacate a decision to allow their application	*d*) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile ou celle d'accorder la demande de protection.
	63. (3) Le résident permanent ou la

for protection.

63. (3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

95. (2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).

109. (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.

(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.

(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.

personne protégée peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête.

95. (2) Est appelée personne protégée la personne à qui l'asile est conféré et dont la demande n'est pas ensuite réputée rejetée au titre des paragraphes 108(3), 109(3) ou 114(4).

109. (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.

(2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.

(3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

III. Analysis

[15] The applicant submits that the Solicitor General's application to vacate his refugee status dated February 12, 2004, upon which the RPD vacated the applicant's refugee status was illegal, *ultra vires*, and contrary to the basic principles of justice.

A. *Issue Estoppel*

[16] According to the applicant, the application to vacate his status constituted double jeopardy in that the initial proceedings, lodged against the applicant to obtain his removal from Canada and an exclusion order were, as a matter of fact, proceedings to vacate his refugee status taken in virtue of subsection 27(3) of the former *Immigration Act*, upon which the decision of the Immigration Division had rendered the decision of September 23 2003, and from which the applicant had initiated an appeal which was then pending before the Immigration Appeal Board.

[17] However, as stated by Linden J.A. for the Federal Court of Appeal in *Boyd v. Canada(Minister of Transport)*, [2004] F.C.J. No. 2080:

> . . . The revocation or suspension of a licence permitting a person to engage in a regulated activity does not attract the prohibition against double jeopardy, a principle applicable only to criminal proceedings or other proceedings with truly penal consequences (*R. v. Shubley*, [1990] 1 S.C.R. 3, at p. 18).
>
> (Emphasis is mine.)

[18] The related concept of *res judicata* (comprised of issue estoppel and cause of action estoppel) is likely more precisely that to which the applicant refers. The Federal Court of Appeal has explained the concept of 'cause of action estoppel' in *Apotex Inc. v. Merck & Co. et al.* (2002), 214 D.L.R. (4th) 429, at paragraph 25:

> These two estoppels, while identical in policy, have separate applications. Cause of action estoppel precludes a person from bringing an action against another where the cause of action was the subject of a final decision of a court of competent jurisdiction. Issue estoppel is wider, and applies to separate causes of action. . . .

[19] The Supreme Court of Canada explains the concept of 'issue estoppel' as follows in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, at paragraph 23:

> Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel) which preludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies. . .

[20] The Federal Court of Appeal in *Apotex Inc. v. Merck & Co.*, [2003] 1 F.C. 242, at paragraph 26, stated:

> Issue estoppel applies to preclude relitigation of an issue which has been conclusively and finally decided in previous litigation between the same parties or their privies (*Angle* and *Doering, supra*). [...] Issue estoppel applies where an issue has been decided in one action between the parties, and renders that decision conclusive in a later action between the same parties, notwithstanding that the cause of action may be different (*Hoystead v. Commissioner of Taxation*, [1926] A.C. 155 (P.C.); *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.)). The second cause of action, however, must involve issues of fact or law which were decided as a fundamental step in the logic of the prior decision. Issue estoppel does not arise if the question arose collaterally or incidentally in the earlier proceedings. The test for such an inquiry is whether the determination on which it is sought to found the estoppel is so fundamental to the substantive decision that the latter cannot stand without the former (*Angle, supra*; *R. v. Duhamel* (1981), 33 A.R. 271 (C.A.); affirmed by [1984] 2 S.C.R. 555).

(Emphasis is mine.)

[21] It is clear that 'cause of action estoppel' is not applicable here. The cause of action before the RPD, whether the application to vacate the applicant's status should be allowed, was not the same as the one that was before the Immigration Division, which was whether the applicant is a person described in paragraphs 36(1)(*c*) and 40(1)(*a*) of the IRPA, and thereby inadmissible to Canada because of serious criminality and misrepresentation. The proceedings before the Immigration Division were therefore not, as the applicant suggests, "as a matter of fact, proceedings to vacate Applicant's refugee status". Neither the Immigration Division nor the IAD has the authority to vacate a Convention refugee status. The only forum that could be seized of the Solicitor General's application to obtain such annulment is the RPD, as per section 109 of the IRPA.

[22] As for "issue estoppel", it is also clear that the precondition that the prior judicial decision must have been final is not met.

[23] Indeed, there is jurisprudence which states that a decision cannot be considered final until the appeal period has expired or until leave to appeal has been denied. For example, in *Novopharm Ltd. v. Eli Lilly and Co.*, [1998] F.C.J. No. 1634, my colleague Madam Justice Tremblay-Lamer stated:

[29] A decision must be final before *res judicata* can apply. If an appeal is pending, the decision is not final. [*Barwell Food Sales Inc. v. Snyder & Fils Inc.* (1988), 24 C.P.R. (3d) 102 (Ont. H.C.J.).]

[30] In the present action, the decision of Reed J. is pending before the Federal Court of Appeal. This alone is sufficient to deny the application for prohibition.

[31] In fact, the Applicants concede that the decision is not final, but submit that this can be remedied by ordering "interim" relief until the appeal is decided. If the appeal is granted, the prohibition would be lifted.

[32] I do not believe it is appropriate to modify the pre-conditions of the principle of *res judicata*, in order to "fit" the relief sought by the Applicants. The decision is not final pending the determination of the appeal. Therefore, there is no *res judicata*; and, there is no abuse of process in the proceedings before the Registrar.

[24] Many other cases also maintain that a decision is not final for the purpose of issue estoppel until the appeal period has expired, or until leave to appeal has been denied (*Wells v. Canada (Minister of Transport),* [1993] F.C.J. No. 341 (FC)*; Morganti v. Strong*, [1998] O.J. No. 1098 (Gen. Div.); *Hough v. Brunswick Centres Inc.,* [1997] O.J. No. 1387 (Gen. Div.); *Kanary v. MacLean*, [1992] N.S.J. No. 326 (S.C.); *Banque Nationale de Paris (Canada) et al. v. Canadian Imperial Bank of Commerce et al.* (2001), 52 O.R. (3d) 161 (C.A.); *Quinlan v. Newfoundland (Minister of Natural Resources),* [2000] N.J. No. 269 (C.A.); *Veroli Investment Ltd. v. Liaukus*, [1998] O.J. No. 2535 (Gen. Div.); *Canstett Ltd. v. Keevil*, [1998] O.J. No. 1630 (Gen. Div.)).

[25] There is also *obiter dictum* of the Supreme Court of Canada suggesting the same. In *C.U.P.E., Local 79*, above, at paragraph 46, Arbour J., for a nine-member panel, stated:

> . . . A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. . .

[26] In the case at bar, the prior judicial decision referred to by the applicant is that of September 23, 2003 by the Immigration Division which found that the applicant was inadmissible for serious criminality and that he was inadmissible to Canada because of misrepresentation. As stated above, the latter decision was appealed by the applicant before the IAD and the appeal was still pending at the time the impugned decision by the RPD was made on May 18, 2005.

[27] Therefore, I find that the prior judicial decision was not final for the purpose of issue estoppel, and consequently, the argument of issue estoppel must fail.

B. *Collateral Attack and Abuse of Process by Relitigation*

[28] The applicant submits that the application to vacate his status constituted a collateral attack upon the decision previously rendered by the Immigration Division on September 23, 2003.

[29] As described by the SupremeCourt of Canada, "a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it" (*Danyluk v. Ainsworth Technologies Inc. et al.,* [2001] 2 S.C.R. 460, para. 20; see also *Wilsonv. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield,* [1993] 4 S.C.R. 333; and *R. v. Sarson*, [1996] 2 S.C.R. 223).

[30] In my opinion, the concept of 'collateral attack', though related to the concepts of estoppel and abuse of process, is not an accurate portrayal of the action of the respondent in this case, as the Minister was not contesting the decision of the Immigration Division.

[31] It is my opinion, however, that the proceedings to vacate the applicant's refugee status, as he had already been found inadmissible for misrepresentation, constitute an abuse of process.

[32] In *C.U.P.E., Local 79*, above, the Supreme Court of Canada quoted, at paragraph 37, Goudge J.A., from *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.):

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. <u>It is a flexible doctrine</u>

unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

[33] As explained by the Supreme Court in *C.U.P.E., Local 79*, "Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice".

[34] Donald Lange, a well-respected author on the doctrine of *res judicata* summarizes the common law principles on abuse of process in *The Doctrine of Res Judicata in Canada*, 2nd ed. (Canada, LexisNexis Canada Inc., 2004), at pages 375-376:

(1) The doctrine is not encumbered by the specific requirements of *res judicata*.

(2) The proper focus for the application of the doctrine is the integrity of the judicial decision-making process.

(3) Relitigation may be necessary to enhance the credibility and effectiveness of judicial decision-making when, for example, there are special circumstances.

(4) The interests of the parties, who may be twice vexed by relitigation, are not a decisive factor.

(5) The motive of a party in relitigating a previous court decision for a purpose other than undermining the validity of the decision is of little import in the application of the doctrine.

(6) The status of a party, as a plaintiff or defendant, in the relitigation proceeding is not a relevant factor.

(7) The discretionary factors that are considered in the operation of the doctrine of issue estoppel are equally applicable to the doctrine of abuse of process by relitigation.

Additionally, there is some jurisprudence that "the second proceeding must be manifestly unfair to a party for the doctrine to be invoked" (see, for example, *Genesee Enterprises Ltd. v. Abou-Rached*, [2001] B.C.J. No. 41 (S.C.); *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.*, [1988] B.C.J. No. 49 (B.C.S.C.); *Ernst & Young Inc. v. Central Guaranty Trust Co.*, [2001] A.J. No. 148 (Q.B.); and *Baziuk v. Dunwoody*, [1997] O.J. No. 2374 (Gen. Div.)).

[35] The respondent submits that the Solicitor General was not only entitled, but had the duty to seek such vacation from the RPD. I disagree.

[36] That the applicant had directly or indirectly misrepresented or withheld material facts relating to a relevant matter that induced or could induce an error in the administration of IRPA was determined by the Immigration Division on September 23, 2003. He was ordered deported. The applicant then, as he was entitled to do, commenced his appeal of that decision.

[37] For the respondent to then seek to have the exact same issue determined under section 109 of IRPA in order to have the applicant's status vacated seems not only unfair, but is clearly an abuse of the Board's processes. The proceedings are unnecessary, and duplicitous. The respondent was also aware that a successful result in the vacation proceedings would terminate the applicant's status and consequently, his appeal of the Immigration Division decision (subsection 63(3) of the IRPA). This was even expressly raised by the respondent to the IAD in support of a postponement of the appeal hearing.

[38] The respondent submits that the applicant cannot validly blame the respondent for having sought to have the law applied in this manner and for the statutory consequences of the applicant's loss of Convention refugee status. Again, I disagree.

[39] It is my opinion that the vacation proceedings constituted an abuse of process by relitigation, and the RPD erred in finding that it had jurisdiction, and in not preventing the abuse of process which constituted the vacation proceedings.

[40] Accordingly, the application for judicial review is allowed, the impugned decision of the RPD, dated May 18, 2005, is set aside and the matter is sent back to the RPD for determination in accordance with the present Reasons for Judgment.

[41] I agree with learned counsel for the respondent that there is no basis for issuance of a certified question in this case.

"Yvon Pinard"

Judge

Ottawa, Ontario

June 20, 2006

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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OF CANADA

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APPEARANCES:

Me Jérôme Choquette, Q.C. FOR THE APPLICANT

Me Daniel Latulippe FOR THE RESPONDENT

SOLICITORS OF RECORD:

Choquette, Beaupré, Rhéaume FOR THE APPLICANT

Montréal, Quebec

John H. Sims, Q.C. FOR THE RESPONDENT

Deputy Attorney General of Canada