Federal Court  Cour fédérale

Date: 20150713

Docket: IMM-7266-14

Citation: 2015 FC 856

Ottawa, Ontario, July 13, 2015

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

RICHARD MARSHALL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Marshall's claim for refugee status in Canada was not successful. Since then, he has had five, yes five, pre-removal risk assessments. Five times it was decided that he would not be at serious risk if returned to Trinidad and Tobago. Five times he obtained leave to have those decisions judicially reviewed. The first four times this Court granted his applications and sent the matter back for redetermination. This is the decision on the fifth judicial review. For the fifth

time, the decision of a senior immigration officer is set aside and the matter referred back for redetermination by another officer.

[2] As Mr. Marshall's situation was clearly set out in the fourth judicial review, that of Mr. Justice Rennie, bearing citation 2013 FC 726, it is not necessary to deal with the facts in any great detail. Suffice it to say that the record indicates that Mr. Marshall emigrated with his parents to the United States when he was a youngster. However, while there he was convicted of "possession with the intent to distribute heroin" and was jailed for six years. He was subsequently deported back to Trinidad and Tobago in 2001.

[3] Upon return there, Mr. Marshall alleges he converted to Islam and somehow got involved with Islamic police officers. He realized they were gangsters and decided to reconvert from Islam. Because of the information he possesses, he claims his life has been threatened, particularly by a rogue policeman, now ex-policeman and ex-prisoner, with the street name "Robocop".

[4] He came to Canada in 2004 on a visitor's visa and later unsuccessfully sought refugee status.

[5] At the heart of his assertion that he will be killed if returned to Trinidad and Tobago are two letters; one purportedly from Sergeant Steve Michael Moss of the Trinidad and Tobago Police Force and the other from Superintendent Joseph Saunders of the Trinidad and Tobago Prison Service in which they say without hesitation that he will be killed upon his return.

[6] By the time the fourth PRRA came around, it was put to Mr. Marshall that the High Commission of Canada had information that these two gentlemen do not exist and that, therefore, the letters are fraudulent. There is now a further letter on file from Mr. Moss in which he says that as of the result of his revelations, he had to flee Trinidad and Tobago in fear for his life and is now hiding out in New York.

[7] Mr. Justice Rennie held that the officer's analysis overall was unreasonable. Mr. Marshall had appeared before the officer who had concerns regarding his credibility. As Mr. Justice Rennie noted at paragraph 27:

> …These concerns are reasonable in light of statements from the authorities in Trinidad and Tobago which indicate that certain letters may be inauthentic.

[8] Having decided the case on the reasonableness standard, as Mr. Justice Rennie noted himself, it was not necessary to address procedural fairness. However, he did say that should the next officer rely on documents from the police authorities in Trinidad and Tobago, procedural fairness would "require disclosure of the outgoing communication between the High Commission of Canada in Port-of-Spain and the Trinidadian authorities." However, he added at paragraph 38:

> Should an officer accept the authenticity of the documents, such disclosure would not be required. It may also be reasonable for an officer to assess the applicant's credibility without reliance on this contested evidence.

[9] He referred the matter back for reconsideration before a different pre-removal risk assessment officer at an office other than Toronto.

[10] The fifth pre-removal risk assessment, the one before me, was carried out by a senior immigration officer at Niagara Falls.

[11] Although counsel had requested an oral hearing, it was refused on the basis that there was no serious issue of credibility. The officer took up Mr. Justice Rennie's *obiter* and treated the letters from Messrs. Moss and Saunders as authentic.

[12] He then came to the view that the letters were insufficient to rebut state protection, particularly since the source of confidential information was not revealed. This was a fatal error.

[13] There is a common law principle of police informer privilege. In *Bisaillon v Keable,* [1983] 2 SCR 60 reference is made to *Marks v Beyfus*, (1890) 25 QBD 494 where Lord Esher wrote:

> …this rule of public policy is not a matter of discretion; it is a rule of law, and as such should be applied by the judge at the trial, who should not treat it as a matter of discretion whether he should tell the witness to answer or not.

[14] This privilege is of such importance that "once found, courts are not entitled to balance the benefit enuring from the privilege against countervailing considerations, as is the case, for example, with Crown privilege or privileges based on Wigmore's four-part test", see: *R v Leipert*, [1997] 1 SCR 281 at para 12.

[15] The role of informer privilege is in part to protect the identity of the informer(s); see: *Bisaillon*, above; *Leipert*, above; *R v Hunter*, 34 CCC (3d) 14, [1987] OJ No 328 (QL); *R v Atout*, 2013 ONSC 1312 at para 19; *R v Barros*, 2011 SCC 51, [2011] 3 SCR 368 at para 30.

[16] The next time around, there is no denying that credibility is at the crux of the matter. If there is no Mr. Moss and no Mr. Saunders, then Mr. Marshall is an unmitigated liar. On the other hand, if they do exist and did write the letters in question, they cannot be dismissed for failing to give full particulars of their confidential informant information. Mr. Marshall's credibility, and state protection, would have to be analysed with that in mind.

[17] It must be remembered that in the leading case dealing with state protection, *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, there was clear evidence from Irish officials that the state was unable to protect Mr. Ward. Should the letters from Messrs. Moss and Saunders be found to be authentic, then it is inappropriate to reach a conclusion on state protection based on general country conditions. As in *Ward*, the authorities in Trinidad and Tobago will have to be specifically engaged.

[18] Full disclosure is also to be given of the correspondence between the High Commission of Canada and the authorities in Trinidad and Tobago so that Mr. Marshall, as required by natural justice, will have an opportunity to respond thereto. An assessment of his risk will only be determined following an oral interview.

[19] Mr. Marshall sought costs. Costs were not granted on the first four judicial reviews. As the officer in this review followed a suggestion of Mr. Justice Rennie, but executed it badly, I do not see any reason why the general principle in immigration matters that matters are decided without costs should be disturbed.

JUDGMENT

FOR REASONS GIVEN;

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is referred back for reconsideration before a different pre-removal risk assessment officer, in accordance with the directions herein.

3. There is no serious question of general importance to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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