Federal Court Cour fédérale

Date: 20151126

Dockets: IMM-7152-14
IMM-7153-14

Citation: 2015 FC 1315

Ottawa, Ontario, November 26, 2015

PRESENT: The Honourable Mr. Justice Barnes

Docket: IMM-7152-14

BETWEEN:

ABHISHEK AJAY SHARMA

Applicant

and

MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondent

Docket: IMM-7153-14

AND BETWEEN:

ABHISHEK AJAY SHARMA

Applicant

and

**MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

AMENDED JUDGMENT

UPON hearing these applications for judicial review at Winnipeg, Manitoba on August 18, 2015;

AND UPON hearing counsel for the parties and reading the materials filed;

AND UPON reserving decision;

AND UPON determining that these applications be dismissed for the following reasons:

[1] The Applicant, Abhishek Ajay Sharma, challenges two related decisions pertaining to a determination that he is inadmissible to Canada on the ground of serious criminality. At the root of his difficulty lies a conviction for sexual assault for which, on June 11, 2013, he received a custodial sentence of two years less a day.

[2] The first decision under review is that of a Canadian Border Security Agency [CBSA] enforcement officer [the Officer], made on March 4, 2014 under section 44(1) of the *Immigration Refugee and Protection Act*, SC 2001, c 27, [IRPA]. The report sent to the Minister by the Officer stated that Mr. Sharma was inadmissible based on the following circumstances:

(a) He is not a Canadian citizen;

(b) He became a permanent resident on February 12, 2007; and

(c) He was convicted of sexual assault at Winnipeg on June 11, 2013 and received a custodial sentence of two years less one day.

[3] The second decision under review is that of the Minister's delegate made on March 4, 2014 under section 44(2) of the IRPA referring Mr. Sharma's case to the Immigration Division [ID] for an admissibility hearing.

[4] On September 15, 2014, the ID found Mr. Sharma to be inadmissible to Canada and it ordered his deportation. That decision was put to the Immigration Appeal Division [IAD], but it declined to hear the matter due to an absence of jurisdiction.

[5] One of the issues before me involves procedural fairness, which must be assessed on the basis of correctness. The second issue raised by Mr. Matas concerns the Officer's assessment of the best interests of the Applicant's child. That is an issue reviewable on the standard of reasonableness.

[6] Mr. Matas contends that the duty of fairness was breached by the failure by one or the other of the two decision-makers to provide him with a copy of the full inadmissibility report (including a highlights report), thereby depriving him of the opportunity to comment on its contents.

[7] In oral argument, considerable attention was paid to the scope of the Officer's discretion to consider personal or mitigating circumstances in the application of section 44 of the IRPA.

[8] The law on this issue continues to be unsettled. One school of thought suggests there is no legal obligation to enquire into so-called humanitarian factors but it is, nevertheless, permissible to do so. Another view holds that there is an obligation to consider mitigating evidence before a reference is made to the ID; however the scope of that duty has yet to be clearly defined.

[9] The idea that it is up to individual decision-makers to self-define their authority and the scope of their discretion has little appeal. The fact that the departmental manual directs decision-makers to examine, among other things, the degree of a person's establishment and the potential for rehabilitation supports the presence of a uniform legal entitlement to a broad review of relevant factors, either favouring or negating relief.

[10] It is, however, unnecessary for me to resolve this issue because, in this case, Mr. Sharma had the benefit of an inquiry into the mitigating factors he put forward for consideration, including a personal interview. Having received the most favourable approach, he has no basis to complain about the scope of the mandate adopted by the Officer.

[11] Mr. Matas argues with considerable conviction that it was a breach of procedural fairness for the Minister's delegate to refer Mr. Sharma's case to the ID for an inadmissibility hearing without having first given him the opportunity to see and comment on the Officer's highlights report. In addition Mr. Matas argues for a heightened duty of fairness based on the following factors:

(a) Mr. Sharma was given a custodial sentence of two years less one day which, at the time, would have allowed for a substantive appeal to the IAD. The sentencing judge was mindful of the collateral consequences of a longer custodial sentence.

(b) Within 8 days of Mr. Sharma's sentencing, the law changed to eliminate a right of appeal to the IAD for custodial sentences of 6 months or more. In the result, Mr. Sharma lost the opportunity to make a case to the IAD to remain in Canada.

(c) The best interests of a child were engaged.

(d) It was theoretically open to the CBSA to render an inadmissibility report to the ID within 8 days of Mr. Sharma's sentencing and to thereby preserve a right of appeal to the IAD. The "failure" by the CBSA to act promptly deprived Mr. Sharma of a meaningful opportunity to avoid deportation.

[12] In order to resolve the fairness issue raised on behalf of Mr. Sharma, it is necessary to examine the procedural history of this case. It begins with a letter dated January 14, 2014 where the Officer invited Mr. Sharma to make submissions on a range of factors:

> It is alleged that you may be inadmissible to Canada under section 44(1) of the *Immigration and Refugee Protection Act*, specifically:
>
> **Paragraph 36(1)(a) In that there are reasonable grounds to believe is a permanent resident or a foreign national who is inadmissible on grounds of serious criminality for having been convicted in Canada of an offence under an act of parliament for which a term of imprisonment of 10 years may be imposed or more than six months has been imposed.**
>
> A decision to allow you to remain in Canada or to seek to have a removal order issued against you will be made in the near future. The next step in the process is to conduct a review of the circumstances of your case. If the officer forms the opinion that your case should be referred for review by the Minister's delegate or the Immigration and Refugee Board, the report, along with the

> details of your case will be forwarded for review. Information such as your age at the time you became a permanent resident of Canada, the length of time you have been here; the location of your family support and related responsibilities; your degree of establishment (work, language, community involvement); any criminal activity in which you may have been involved and any other relevant factors will be considered in the decision making process.
>
> You may make **written** submissions, which need to be submitted **no later than January 29, 2014**, by providing reasons why a review **should not** be caused. You can fax any pertinent information to me, at 204-984-4009. Should you choose not to submit any information or documentation; a decision will be made based on the information available on your file.

[13] On the same day the Officer convened an interview with Mr. Sharma. Among other topics covered were his family ties (including his 3-year-old son), his education, his employment history, his financial circumstances including child support, and his outside affiliations.

[14] A month later, Mr. Sharma sent a 9-page submission to the CBSA arguing for leniency. Included with that submission were numerous letters of community and family support. Two of those letters noted his close ties to his son and of the need to maintain the parent/child relationship.

[15] On March 4, 2014, the Officer submitted a report under section 44(1) of the IRPA to the Minister expressing her opinion that Mr. Sharma was inadmissible. Included in that report was a highlights report which touched on his family and community support, his son (then living in Calgary), and the details of his criminal conduct and conviction. The Minister's delegate reviewed the materials and referred the case to an inadmissibility hearing before the ID.

[16] Applying the relevant authorities to the process described above, I do not accept that a breach of procedural fairness occurred. I am also not convinced that any of the evidentiary factors raised by Mr. Matas are germaine to the underlying fairness argument.

[17] It is true that the change in the legislation effectively removed a substantive right of appeal and frustrated the intention of the criminal sentencing court. But substantive rights are not infrequently lost by virtue of legislative change and, absent protective transitional provisions, Parliament is presumed to be cognizant of such consequences. The argument that the CBSA should have acted more quickly also has no merit. It is doubtful that the CBSA was even aware of Mr. Sharma's sentencing in the 8 days before the legislative change and, in any event, there was no realistic possibility that it could have acted within that time-frame even if it was aware.

[18] I am also not convinced that any of these considerations, including the best interests of a child, are relevant to the question of whether Mr. Sharma ought to have been given a copy of the Officer's highlights report before the Minister's delegate referred his case to the ID. It was either fair to Mr. Sharma for the CBSA to act as it did or it was not. Neither the consequences flowing from the legislative change nor the fact that a child was involved have any relevance to the fairness of the procedures that were followed.

[19] The question that remains is whether the duty of fairness required that Mr. Sharma be given a copy of the inadmissibility and highlights report before his case was referred to the ID. Mr. Matas argues that Justice Judith Snider recognized such a duty in *Hernandez v Canada*,

2005 FC 429, [2005] FCJ No 533. I do not read her decision in that way. Indeed at paras 71 and 72, she expressly rejected that argument:

> 71 Implicit in this duty is, in my view, a requirement that the person being interviewed by an immigration officer is informed of the purpose of that interview so that he may make meaningful submissions. Further, I would think that the duty of fairness would require the immigration officer put to the interviewee any information he has that the interviewee would not reasonably be expected to have. A further implication is that the person should be offered the opportunity to have counsel present at any interview or to assist him in preparing written submissions. All of this is part of what CIC has acknowledged is required for the person to "fully understand both the case against them and the nature and purpose of the report".
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> 72 Given my conclusion that the duty of fairness is "relaxed", there are a number of procedures that are not essential. As was concluded in Baker, I would agree that an oral interview by the immigration officer is not always required, as long as the affected person is given an opportunity to make submissions and to know the case against him. Nor do I believe that the duty requires that the Officer's Report be put to the Applicant for a further opportunity to respond prior to the s. 44(2) Referral. The duty of fairness in this case does not reach the same level as in Bhagwandass v. Canada (Minister of Citizenship and Immigration), [2001] 3 F.C. 3 (F.C.A.).

Also see *Chand v Canada*, 2008 FC 548 at paras 23-26, [2008] FCJ No 876 and *Hernandez v Canada*, 2007 FC 725 at paras 21-24, [2007] FCJ No 965.

[20] It is quite clear from the record before me that Mr. Sharma was afforded all of the rights of due process recognized in the above authorities. He was well aware of the circumstances triggering his difficulties. He was told he was at risk of an inadmissibility finding. He was afforded an interview and given the opportunity to make additional submissions. He took advantage of those opportunities albeit without paying much attention to his parental

relationship. In these circumstances, the claimed right to challenge the inadmissibility report in advance of its referral to the ID is simply a demand to replicate what had already been afforded to him. No breach of the duty of fairness arises in these circumstances.

[21] The further argument that the decision-makers were not alive, attentive or sensitive to the best interests of Mr. Sharma's young child is also without merit. If there is a lack of detail on this issue in the highlights report, it is a consequence of a lack of attention paid to it by Mr. Sharma. In *Naidu v Canada*, 2006 FC 1103, [2006] FCJ No 1392, the Court addressed the failure of an applicant to make out a best interests case in the following way:

> 17 Notwithstanding the differing views on this issue, the authorities make it clear that an applicant must present sufficient evidence to engage the humanitarian and compassionate discretion. In this case, Mr. Naidu manifestly failed to meet that burden. It is not sufficient to state that a child's interests will be affected by a deportation because it will rarely be otherwise. What is required is clear and convincing evidence of the likely effect of a deportation upon an affected child. This would typically include evidence of unique personal or economic vulnerabilities or bonds between the parent and child or, where the child is also leaving Canada, evidence of resulting and material disadvantage or risk to the child.
>
> 18 Here, the PRRA Officer had nothing to go on beyond "the bare recital of basic information" (see Alabadleh at paragraph 18). It is not the obligation of a PRRA Officer to make further inquires or to essentially make the case for an applicant. This point has been conclusively determined in Alabadleh, above, and in Owusu v. Canada (Minister of Citizenship and Immigration) [2004] F.C.J. No. 158, 2004 FCA 38, where Justice Evans held at paragraph 8:
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>> H & C applicants have no right or legitimate expectation that they will be interviewed. And, since applicants have the onus of establishing the facts on which their claim rests, they omit pertinent information from their written submissions at their peril. In our view, Mr. Owusu's H & C application did not adequately raise the impact of his potential deportation on the best interests of his children so as to require the officer to consider them.

[22] In this case Mr. Sharma provided no information about the substance of his custodial or visitation rights nor did he describe the extent to which he was actually involved in the life of his child in the face of their geographical separation.

[23] It also bears consideration that Mr. Sharma has potential recourse to humanitarian and compassionate relief where the best interests of his child will presumably attract more meaningful attention from both him and the responsible decision-maker: see *Varga v Canada*, 2006 FCA 394, [2006] FCJ No 1828.

[24] For the foregoing reasons, this application is dismissed.

[25] In keeping with his usual thoroughness, Mr. Matas has proposed four questions for certification. Two of those questions pertain to the scope of the discretion afforded to decision-makers under section 44 of the IRPA. I decline to certify those questions because they would not be determinative in the face of what took place. Mr. Matas also raises the fairness question. Notwithstanding the apparent uniformity of the decisions on point in this Court, I will, with some hesitation, certify the following question for appeal:

> Does the duty of fairness require that a report issued under section 44(1) of the IRPA be provided to the affected person before the case is referred to the Immigration Division under section 44(2)?

THIS COURT'S JUDGMENT is that this application is dismissed.

THIS COURT'S FURTHER JUDGMENT is that the following question be certified:

> Does the duty of fairness require that a report issued under section 44(1) of the IRPA be provided to the affected person before the case is referred to the Immigration Division under section 44(2)?

"R.L. Barnes"

Judge