Federal Court  Cour fédérale

Date: 20160705

Dockets: IMM-3874-15
IMM-3872-15
IMM-3873-15

Citation: 2016 FC 755

Ottawa, Ontario, July 5, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

SHAQE BERISHA

Applicant

and

ATTORNEY GENERAL OF CANADA, THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

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JUDGMENT AND REASONS

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [the Act]. The Applicant seeks judicial review of three interrelated decisions:

A. A report under subsection 44(1) of the Act [the Report] dated February 16, 2015 and made by an Inland Enforcement Officer [the Officer] at Canada Border Services Agency;

B. A referral under subsection 44(2) of the Act [the Referral] dated February 27, 2015 and made by a Delegate of the Minister [the Delegate] at Canada Border Services Agency;

C. A deportation order [the Order] dated August 7, 2015 and issued by a member [the Member] of the Immigration Division of the Immigration and Refugee Board of Canada.

[2] The three matters, originally filed separately, were consolidated into this judicial review.

I. Background

[3] The Applicant was born in Kosovo in 1976 and arrived in Canada as a refugee on October 31, 2005. On March 16, 2011, the Applicant made an application for Canadian citizenship.

[4] On June 13, 2012, the Applicant was charged with sexual assault pursuant to section 271 of the *Criminal Code*, RSC 1985, c C-46. Sexual assault is an indictable offence and, as per subsection 22(1) of the *Citizenship Act*, RSC 1985, c C-29 as it read at the relevant time, "a person shall not be granted citizenship … or take the oath of citizenship … while the person is charged with, on trial for or subject to or a party to an appeal relating to … an indictable offence under any Act of Parliament".

[5] On March 11, 2013, the Applicant wrote his citizenship test. At that time, he signed a form declaring that he was not prohibited from taking the oath of citizenship. On May 16, 2013, he appeared before a Citizenship Judge, signing another form once again declaring that he was not prohibited from taking the oath.

[6] On September 17, 2013, the same day the Applicant's trial for the sexual assault charge was scheduled (but adjourned), the Applicant took his oath of citizenship and was issued a certificate of citizenship. Citizenship and Immigration Canada [CIC] was only informed of the charge against the Applicant after it had administered the citizenship ceremony.

[7] On October 11, 2013, the Applicant was convicted of sexual assault.

[8] On November 7, 2013, the Applicant received a letter from the Registrar of Canadian Citizenship. The Registrar had decided to cancel his certificate of citizenship since the Applicant "had been charged with an indictable offence and [was] prohibited from taking the Oath". The Applicant did not challenge this citizenship decision.

[9] On July 4, 2014, the Applicant was sentenced to three years' imprisonment.

[10] On February 5, 2015, the Applicant received a letter from the Officer advising him that an inadmissibility report might be issued against him under subsection 44(1) of the Act based on grounds of serious criminality (as per paragraph 36(1)(a) of the Act). The letter invited the Applicant to make submissions in response and he did so.

[11] The Officer issued the Report on February 16, 2015, finding the Applicant inadmissible pursuant to paragraph 36(1)(a) based on the following information:

> THAT: SHAQE BERISHA
>
> - IS NOT A CANADIAN CITIZEN
> - BECAME A PERMANENT RESIDENT ON 31OCT2005
> - WAS CONVICTED ON 11OCT2013 AT MOOSE JAW, SK OF SEXUAL ASSAULT CONTRARY TO SECTION 271 OF THE CRIMINAL CODE OF CANADA
> - WAS SENTENCED ON 04JUL2014 TO THREE YEARS IMPRISONMENT
> - SEXUAL ASSAULT IS AN INDICTABLE OFFENCE AND IF CONVICTED THE MAXIMUM PUNISHMENT IS A TERM OF IMPRISONMENT NOT EXCEEDING TEN YEARS
>
> (Certified Tribunal Record for File IMM-3874-15 at 16 [CTR])

[12] The Officer also prepared a referral letter to accompany the Report that provided more detail about the Applicant's circumstances and submissions. In that letter, the Officer recommended that the file be referred for an admissibility hearing and that the Applicant be issued a deportation order:

> This is Mr. Berisha's only conviction however it was from a crime which was being committed throughout a long period of time and it was a violent crime which will have a big impact on the victim. He also shows he can not [*sic*] be trusted as he misrepresented on his citizenship papers as he failed to declare his outstanding charges on numerous occasions. Mr. Berisha will not have appeal rights however he is a convention refugee and if a deportation order is issued CBSA still requires a danger certificate to remove the subject from Canada.
>
> (CTR at 10)

[13] The Officer also noted that he was advised that the Applicant was not a Canadian citizen.

[14] On February 27, 2015, the Delegate referred the Report to the Immigration Division for an admissibility hearing. In the Referral, the Delegate agreed with the Officer's recommendations as laid out in the Report and the referral letter.

[15] On August 7, 2015, after an admissibility hearing, the Member issued the Order. In reasons issued orally at the hearing, the Member concluded that the Applicant was not a citizen of Canada, had been convicted of sexual assault under section 271 of the Criminal Code, and was therefore inadmissible. This in turn, the Member concluded, required the issuance of a Deportation Order.

II. Issues

[16] The Applicant raises three issues:

A. Did the Officer err in issuing the Report when the Applicant had a certificate of citizenship at the time of his conviction?

B. Did the Officer or the Delegate err in failing to provide adequate reasons?

C. Did the Officer or the Delegate err in failing to provide the Applicant an opportunity to make submissions?

III. Analysis

A. *Standard of Review*

[17] The question of whether the Officer could have issued the Report in the first place depends on a finding of fact: whether the Applicant was, or was not, a citizen at the time of the conviction. As such, it is reviewable on a reasonableness standard (*Faci v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 693 at para 17). This Court will not intervene if the decision as a whole is justified, transparent, and intelligible, and falls within a range of acceptable, defensible outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[18] Similarly, the question of whether the Officer (in issuing the Report) or the Delegate (in issuing the Referral) provided adequate reasons is reviewable on a reasonableness standard (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 11 [*Newfoundland Nurses*]). Adequacy of reasons is not a stand-alone basis of review. Instead, it must be considered "together with the outcome" and "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met" (*Newfoundland Nurses* at paras 14-16).

[19] Finally, the question of whether the Applicant was given sufficient opportunity by either the Officer or the Delegate to make submissions is an issue of procedural fairness and is thus

reviewable on a correctness standard (*Finta v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1127 at para 30 [*Finta*]).

B. *Did the Officer err in issuing the Report?*

[20] The Applicant argues that the Officer erred in issuing the Report since, at the time of the conviction, the Applicant had been issued a certificate of citizenship. It was only after the conviction that the certificate of citizenship was revoked. Since there is nothing in the Act that says that a citizen can be the subject of a report under subsection 44(1), and since the letter from the Registrar does not state that the cancellation would have a retroactive effect, the Applicant argues that he cannot properly be subject to an inadmissibility report, a referral under subsection 44(2) of the Act, or a deportation order. The Applicant further explained at the hearing that a statutory interpretation of that section could only lead to one conclusion: that only the Applicant's status at the time of the conviction matters. If the legislators had wanted to include citizens who subsequently lost their citizenship from that clause, they would have explicitly stated so.

[21] The Respondent accepts that the Applicant had been issued the certificate of citizenship prior to his conviction, but argues that it was of no effect at the time of his conviction because he had not met the requirements of the Act when he received it. The certificate of citizenship was issued on September 17, 2013; at that point, the Applicant had declared, wrongly, that he was not barred from taking the oath. In reality, he *was* barred because of the June 13, 2012 charge. As a result, the Applicant was never a citizen in the first place and the Officer's conclusion – that he

was a permanent resident and thus could be subject to an inadmissibility finding – was entirely reasonable.

[22] I agree with the Respondent that the Officer did not err in issuing the Report. The language of paragraph 22(1)(b) of the *Citizenship Act* is clear that a person shall not be granted citizenship or take the oath of citizenship if charged with an indictable offence:

> 22 (1) Despite anything in this Act, a person shall not be granted citizenship under subsection 5(1), (2) or (4) or 11(1) or take the oath of citizenship
>
> > (b) while the person is charged with, on trial for or subject to or a party to an appeal relating to an offence under subsection 29(2) or (3) or an indictable offence under any Act of Parliament, other than an offence that is designated as a contravention under the Contraventions Act;

[23] Furthermore, subsection 12(3) of the *Citizenship Act* states that:

> 12 (3) A certificate issued pursuant to this section does not take effect until the person to whom it is issued has complied with the requirements of this Act and the regulations respecting the oath of citizenship.

[24] In other words, if a certificate is issued but the recipient has not complied with the requirements of the *Citizenship Act*, then the certificate does not take effect. Therefore, it cannot be said that the certificate ever conferred any status whatsoever. As noted by Justice Russell in *Afzal v Canada (Citizenship and Immigration)*, 2014 FC 1028 at para 25, "[s]ubsection 12(3) provides a legislative foundation for the cancellation of a certificate issued in error. A certificate, even if issued, is of no effect where the conditions precedent to citizenship have not been met".

[25] One such condition precedent, as is plainly described in paragraph 22(1)(b) of the *Citizenship Act*, is that the recipient of the certificate not take the oath of citizenship while at the same time be charged with an indictable offence – such as sexual assault under section 271 of the Code. The Applicant was so charged at the time he took the oath of citizenship and received the certificate of citizenship. He thus had not met one of the conditions precedents to citizenship. Indeed, the evidence on file from CIC indicates that it never considered the Applicant to have had citizenship: in response to inquiries made by the Officer, CIC responded that "with the information provided, we have searched our records and have found no indication that this person has been granted or issued a certificate of Canadian Citizenship or naturalization" (CTR at 018).

[26] I can find no error in the Officer's decision to issue the Report when he did. The Applicant's certificate of citizenship was of no effect and thus he was a permanent resident at the time the Report was issued.

[27] As to the wording of the statute, subsection 44(1) of the Act reads as follows:

> 44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.
>
> (Emphasis added)

[28] The Applicant, who was only a permanent resident at the time of the Report, met this criterion due to paragraph 36(1)(a) of the Act, the relevant parts of which are underlined below:

> 36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

[29] According to the Applicant, the above provisions require that an officer look only at permanent resident or foreign national's status at the exact moment in time when the conviction occurs. I disagree and do not find that a plain reading of the statute means anything other than that which the Officer, Delegate, and Member interpreted it to mean – that he was a permanent resident and not a citizen at the time each of their decisions were taken.

[30] The Applicant argues that had status during about six weeks in the fall of 2013 and one cannot retroactively take that status away. Again, I disagree. As already explained above, in light of the relevant provisions of the *Citizenship Act* then in force, the Applicant never obtained status even though he obtained a certificate. That certificate was obtained through misrepresentation. Even if the misrepresentation was innocent as the Applicant claims and he misunderstood the two forms in which he attested to having no outstanding criminal charges (which he clearly knew about, including adjourning court when it conflicted with his citizenship ceremony), such a misunderstanding does not confer status upon him. As discussed above, the certificate issued to him never took effect because he never complied with the requirements of the Act respecting the oath. And even if I am wrong and he had status for those six weeks, I do not agree that one can only look at his status at the moment the conviction occurred. This does not accord with either a plain or contextual reading of the statute and the Applicant could not point to any precedent supporting his interpretation of the legislation.

C. *Did the Officer and the Delegate provide adequate reasons?*

[31] The Applicant argues that the Officer and the Delegate (who adopted and relied on the Officer's reasons as expressed in the Report and the Officer's referral letter) failed to provide adequate reasons for their respective decisions, but rather only provided factual statements along with a vague and unclear accompanying letter full of broad conclusive statements lacking evidentiary support.

[32] The Applicant further argues that there was insufficient evidence to conclude that he was not "trustworthy" as a result of his citizenship history, and in any event, trustworthiness was not a relevant or appropriate factor for the Officer and the Delegate to consider. As such, the Applicant submits that their reasons are inadequate and lack a coherent and proper analysis of the Applicant's circumstances.

[33] I find, to the contrary, that the Report provided more than adequate reasons. The Officer laid out the factual basis for the decision to report: that the Applicant was not a Canadian citizen and that the Applicant was convicted of sexual assault, an indictable offence. These facts alone were sufficient to make the recommendation and referral and served as the foundation for all three decisions. They were certainly sufficiently clear for the Applicant to address them at the admissibility hearing. As noted by Justice Zinn in his discussion on adequacy of reasons in the inadmissibility report context, "reasons are required, given the importance of the decision to the person being considered for removal. However, that is not to say that the reasons that are given must be of the detail required in quasi-judicial or judicial proceedings… the test is whether they allow the person affected to understand why the decision was made and allow the reviewing

court to assess the validity of the decision" (*Iamkhong v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 1349 at paras 31-32 [*Iamkhong*]; see also *Richter v Canada (Minister of Citizenship and Immigration)*, 2008 FC 806, at para 18, aff'd 2009 FCA 73 [*Richter*]).

[34] I also disagree with the Applicant's suggestion that the reasons provided in the Officer's letter of referral were vague and drew conclusions about the history of his citizenship application without sufficient evidence. The referral letter provides a detailed timeline of the Applicant's interactions with both immigration and law enforcement officials and clearly identifies the evidence upon which the Officer reaches his decision to report. The Officer's assessment that the Applicant could not be trusted was based on the fact that he had more than once failed to disclose the charge of sexual assault when required.

[35] Finally, with respect to the appropriateness of taking "trustworthiness" into consideration, the case law states that, while exercising a very limited discretion, both the Officer and the Delegate may consider some other factors (*Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 at para 37). In *Fabbiano v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1219, for example, Justice O'Reilly wrote:

> [15] The role of the Minister's delegate is to consider the evidence relevant to admissibility, and to exercise his or her discretion in the circumstances, which may include H&C factors (*Faci v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 693, at para 31). The latter are more significant in cases involving persons, like Mr Fabbiano, who are long-term permanent residents of Canada. According to departmental guidelines, a delegate should consider the person's age, the duration of his or her residence in Canada, family circumstances, conditions in the person's country of origin, the degree of the person's establishment in Canada, the person's criminal history, and his or her attitude (see Citizenship and

> Immigration Canada, "ENF 6 - Review of reports under A44(1)" at 19.2).

[36] In short, I see nothing inappropriate in the Officer and the Delegate's consideration of the Applicant's previous history of non-compliance with immigration authorities. That said, even if it were unreasonable to consider the Applicant's trustworthiness, I find that the Officer's comment was clearly superfluous *obiter*. The determinative findings in the matter were the Applicant's status as a permanent resident and his conviction for sexual assault. These findings offered sufficient grounds for the Report, the Referral, and ultimately the Order.

D. *Did the Officer and the Delegate err in not giving the Applicant an opportunity to make submissions?*

[37] The Applicant argues that he was not permitted to explain the circumstances around his certificate of citizenship and its revocation or to address any issues of trustworthiness. Since these were relevant matters for the Officer, he should have been afforded the opportunity, either orally or in writing, to make submissions on these points.

[38] Individuals who are subject to section 44 proceedings are owed a duty of procedural fairness. However, as was noted recently in *Huang v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 28 at para 84, the case law establishes a relaxed duty of fairness in the context of subsection 44(1) and 44(2) decisions. This duty confers two rights: the right to make submissions (either written or oral) and the right to obtain a copy of the reports (see also *Richter* at para 18; *Finta* at para 35; *Iamkhong* at 31).

[39] Here, the Applicant was afforded the opportunity to make submissions before the Report was issued and was given a copy of the Officer's reasons in order to prepare for the inadmissibility hearing. There is no right to be informed of the specific factors that the Officer or the Delegate might consider, especially when the Applicant takes issue with parts of the assessment based on information he already had (*Tran v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 1078 at para 19). Here, the Applicant knew that his certificate of citizenship had been revoked and knew that this was because he had not provided proper disclosure of his pending sexual assault trial. In any event, as already pointed out above, the comments on trustworthiness were superfluous and the equivalent of *obiter*.

IV. Conclusion

[40] In light of all of the above, this application for judicial review is dismissed. No questions are certified and no costs are ordered.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. No questions are certified; and

3. No costs are ordered.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-3874-15 IMM-3872-15 IMM-3873-15
STYLE OF CAUSE:	SHAQE BERISHA v ATTORNEY GENERAL OF CANADA, THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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