Federal Court  Cour fédérale

Date: 20160719

Docket: IMM-262-16

Citation: 2016 FC 824

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 19, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

TUYEN PHAM

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision by the Minister's delegate to defer an Inadmissibility Report [Report] prepared in accordance with subsection 44(1) of the IRPA to

the Immigration Division [ID] of the Immigration and Refugee Board, under subsection 44(2) of the IRPA.

II. Facts

[2] The applicant, Tuyen Pham (37 years old), is a stateless person. He has been a permanent resident of Canada since 1991. He fled Vietnam with his parents at age 3, and has since never returned. He is the father of three minor children who are Canadian citizens.

[3] The applicant has a considerable criminal history. In May 2001, the applicant was found guilty of possession of a listed substance (cocaine) for the purpose of trafficking, contrary to subsection 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA]. A deportation order was issued against the applicant in September 2002. In a decision dated July 8, 2003, the Immigration Appeal Division ordered a five-year stay of the removal order for humanitarian and compassionate considerations.

[4] On May 21, 2013, the applicant was found guilty of possession of listed substances (marihuana) for the purposes of trafficking, contrary to subsection 5(2) of the CDSA. On October 2, 2013, the applicant was sentenced to 12 months' imprisonment. On January 13, 2014, a Report was prepared regarding the applicant, in accordance with subsection 44(1) of the IRPA because the officer who wrote the Report was of the opinion that the applicant was inadmissible on grounds of serious criminality under paragraph 36(1)(*a*) of the IRPA. After interviewing the applicant on January 14, 2014, the officer found that the Report was well founded.

On May 6, 2014, the applicant was invited to make submissions, which were sent on June 23, 2014.

[5] On September 17, 2015, the officer gave his supervisor a summary of the facts and recommended that the case be referred to the ID. The Assistant Director of the Canada Border Services Agency Investigations and Removals Unit (Montréal) [Minister's delegate] decided to refer the case to the ID for it to determine whether the applicant was inadmissible in accordance with paragraph 36(1)(*a*) of the IRPA.

[6] That decision is the subject of this judicial review.

III. Issues in dispute

[7] The following issues in dispute are the subject of this judicial review:

1. Did the Minister's delegate err in his assessment of the factors to take into consideration when determining whether the case should be referred to the ID?
2. Did the Minister's delegate err in his analysis of the best interests of the children?

IV. Positions of the Parties

[8] The applicant argues that the Minister's delegate erred by failing to weigh all of the relevant factors set out in the *Enforcement Manual – Chapter ENF 6: Review of reports under A44(1)* [Manual]. In particular, the applicant argued that as a long-term permanent resident, the Minister's delegate apparently should have paid special attention to his file before it was referred

to the ID. In this case, the Minister's delegate allegedly erred by merely listing the factors to consider without assessing them. Furthermore, the applicant argues that, the Minister's delegate failed to take into account the best interests of the children in his reasons. In so doing, the decision made by the Minister's delegate is unreasonable.

[9] The respondent, however, argues that the Minister's delegate considered all of the factors set out in the Manual in a reasonable manner, even though it was not his duty to take them all into consideration in light of his discretionary power (*Spencer v. Canada (Citizenship and Immigration)*, 2006 FC 990, at paragraph 15; *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 429). As regards the best interests of the children, the respondent claims that the Minister's delegate was not required to be "alert, alive and sensitive" to the best interests of the children directly affected because it was not an application under subsection 25(1) of the IRPA, as was the case in *Kanthasamy v. Canada (Citizenship and Immigration)*, [2015] 3 SCR 909, 2015 SCC 61 [*Kanthasamy*]. The respondent also argues that in a follow-up done in accordance with subsection 44(2) of the IRPA, the best interests of a child alone are not a paramount consideration.

V. Analysis

[10] The applicant primarily maintains that the decision-maker erred in exercising his discretion, by not considering all of the relevant factors, and in his assessment of humanitarian and compassionate considerations. These types of questions must be reviewed by this Court on the standard of reasonableness (*Balan v. Canada (Public Safety and Emergency Preparedness)*, 2015 FC 691, at paragraph 19 [*Balan*]).

[11] The key points of the applicant's claims are that the Minister's delegate erred in exercising his discretion, by not considering all of the factors set out in the Manual in his analysis, and by failing to conduct a thorough analysis of the best interests of the child as set out in *Kanthasamy*.

[12] The scope of the discretionary power available to the Minister's delegate to determine whether the case must be referred to the ID is an issue that has not yet been resolved (*Canada (Public Safety and Emergency Preparedness) v. Tran*, 2015 FCA 237, at paragraph 12; *Cha v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 FCR 409, 2006 FCA 126, at paragraph 41 [*Cha*]; *Richter v. Canada (Citizenship and Immigration)*, 2008 FC 806, at paragraph 14 [*Richter*], confirmed by *Richter v. Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 73). Case law acknowledges that the scope of the discretion available to the Minister's delegate varies depending on the alleged reasons and whether the person concerned is a permanent resident or a foreign national (*Cha*, above, at paragraph 22; *Richter*, above, at paragraph 14). However, the Minister's delegate's discretion is likely limited to subsection 44(2) of the IRPA, given the detailed wording in section 36 of the IRPA (*Balan*, above, at paragraph 25), even for permanent residents deemed inadmissible on grounds of serious criminality in accordance with paragraph 36(1)(*a*) of the IRPA (*Balan*, above, at paragraph 26).

[13] In this case, it was not necessary to rule on that question because the decision made by the Minister's delegate is reasonable, regardless of the scope of his discretion.

[14] In the handling of his file, the applicant could reasonably expect that his application would be dealt with in accordance with the process set out in the Manual (see *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 SCR 559, 2013 SCC 36; *Canada (Citizenship and Immigration) v. Jayamaha Mudalige Don*, 2014 FCA 4, at paragraph 52). In this regard, section 19.2 of the Manual – *19.2 A44(1) reports concerning permanent residents of Canada*, sets out a non-exhaustive list of factors that may be considered in both criminal and non-criminal cases. That same section of the Manual also states that the seriousness of the offence is an important consideration. Section 19.3 of the Manual states that in the case of long-term permanent residents, a decision to refer a case must be made at the manager or director level in the region concerned. In this case, this process was followed, since an assistant director agreed with the officer's recommendations in the record to refer the case to the ID for investigation.

[15] In this case, the applicant is mainly relying on *Faci v. Canada (Public Safety and Emergency Preparedness)*, 2011 FC 693 [*Faci*] to argue that the Minister's delegate erred in not taking into consideration all of the factors set out in the Manual. However, although there was a discrepancy regarding the scope of the Minister's delegate's discretion, the decision relied on by the applicant to argue that the Minister erred by not considering all of the factors set out in the Manual specifically stated the opposite of what the applicant maintains:

> [63] The jurisprudence of this Court makes clear that, when deciding whether to recommend an admissibility hearing, the

> Minister's Delegate has the discretion, not the obligation, to consider the factors set out in ENF 6. See *Lee*, above, at paragraph 44; and *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, at paragraphs 22-23. The Minister's Delegate in this case reasonably concluded that country conditions need not be considered at this stage of the process because a risk assessment would have to be done before the Applicant could be removed. [My emphasis.]
>
> (*Faci*, above, at paragraph 63)

[16] In this case, the Minister's delegate's reasons are sufficiently detailed to enable the Court to rule on the reasonableness of its findings. In so doing, although the Minister's delegate did not analyze each factor, his decision was reasonable because his reasons show that he took them into consideration.

[17] Second, as regards the applicant's arguments on humanitarian and compassionate considerations, the Court dismisses them.

[18] In deciding whether the case must be referred to the ID, the Minister's delegate did not conduct an in-depth review of the humanitarian and compassionate considerations. Therefore, although the Minister's delegate is allowed a residual discretion to take into account humanitarian and compassionate considerations (*Balan*, above, at paragraph 27; *Richter*, above), the decision made by the Minister's delegate under subsection 44(2) of the IRPA is not a full in-depth review of the humanitarian and compassionate considerations (*Faci*, above, at paragraph 25). Insofar as the Minister's delegate had this residual discretion, he considered these reasons in a reasonable manner.

VI. Conclusion

[19] The Court finds that the decision made by the Minister's delegate under subsection 44(2) is reasonable. Consequently, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question of importance to certify.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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