Federal Court  Cour fédérale

Date: 20171130

Docket: IMM-1945-17

Citation: 2017 FC 1083

Ottawa, Ontario, November 30, 2017

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

NAHEED KARIM VIRANI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The present Application concerns a Decision of an Immigration Officer (the Officer), dated March 15, 2017, to issue a report in accordance with s. 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) in which the Applicant, a citizen of Tanzania and a foreign national, was found to be inadmissible to Canada pursuant to s. 36(1)(a) of the *IRPA*. The issue for determination is whether the Officer understood the scope of discretion available in reaching the decision presently under review.

I. The Factual Scenario

[2] On December 15, 2015 the Applicant was convicted of possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 and on March 21, 2016 he was sentenced to 63 months imprisonment.

[3] As a result, consideration was given as to whether the Applicant should be required to leave Canada. The first step in the process in arriving at a conclusion was to place the issue before the Officer for a decision. Two provisions of the *IRPA* were engaged:

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 :
(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;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
[…]	[…]
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.	44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre

[4] On the Applicant's behalf, in a letter dated March 13, 2017, counsel for the Applicant submitted the following argument to the Officer:

> Dear Officer,
>
> I represent Naheed Karim Virani (DOB December 9, 1987 UCI 4491-0010). I sent a fax enclosing a Use of Representative and the PSR for my client last year on April 29, 2016 to CBSA advising that I was counsel and requesting that I be advised when/if a s. 44 report was being contemplated. My client, through his long term conjugal partner, Ms. Grewal advises that he has been advised by his Parole Officer that CBSA is in contact.
>
> I would like to make the following preliminary submissions requesting positive discretion in not writing a s. 44 report and, in the alternative, for the Delegate not to refer the Report if written.
>
> Firstly, I will note that Naheed has been in this country for many years. His family (Karim Virani DOB February 18, 1963; Nimet Virani October 14, 1965, and Shyzmeen Virani July 14, 1989) have all been granted permanent residence through the humanitarian and compassionate process. The family came here in 2002 when Naheed was just a teenager; at the time of the PSR [*sic*] lived with his family.
>
> Naheed graduated from James Fowler here in 2006 and obtained a further education at SAIT. He has been in a relationship with Harneet Grewal, a Canadian Citizen, since 2009. He has maintained a positive history employment, helping to support his family; the family owns their own residence are involved in their community (they belong to the Ismaili Muslim community). The writer of the PSR, despite having reservations due to the new related charge(s) recommended a period of community supervision. He has never had any compliance issues in the year prior to the PSR; has positive support and community ties.
>
> I believe that the PSR needs to be considered by the responsible Officer/Minister's Delegate. It canvasses Naheed's significant establishment in this country (he has been here since he was 14 years of age, he graduated high school and obtained further education here); his significant family ties here (his entire immediate family is here with status, a very close relationship with his younger sister, and of course a stable and long term conjugal relationship with a Canadian citizen); a return scenario will result in him returning to a country where he has not lived in, studied (except for junior high school), or worked. The submissions for the

rest of the family (my law partner, Bjorn Harsanyi was counsel for them) indicated that the family house, business and belonging [*sic*] are gone in Tanzania and Naheed literally has nothing to return to. Those submissions also canvassed the significant problems Tanzania continues to face:

The three most widespread and systemic human rights problems in the country were excessive use of force by security forces resulting in deaths and injuries, gender-based violence including female genital mutilation/cutting (FGM/C), and lack of access to justice as well as a related continuation of mob violence. Other human rights problems included harsh and life threatening prison conditions, lengthy pretrial detention, some restrictions on religious freedom, restrictions on political expression, child abuse, and discrimination based on sexual orientation, and societal violence against persons with albinism. Trafficking in persons, both internal and international, as well as child labor were also problems. In some cases, the government took steps to prosecute those who committed abuses, but instances of impunity also occurred.

Further, discrimination against Muslims continues to occur, despite the fact that Tanzania has a very large Muslim population. The following article demonstrates discrimination in the realm of education:

> The truth of the matter is that in both higher education and the public service, Muslims are severely underrepresented. They have never made up more than a fifth of the country's students, often less. Since colonial times, the education system has been dominated by Christians and in particular the powerful Catholic Church.
>
> Nowadays, with drastic shortage of high schools, academic performance alone is not sufficient to determine whether a pupil will get a place at one after leaving primary school. It is a very selective system, "an open door to discrimination," according to Hamza Njozi, vice chancellor of the university in Morogoro.

If a Report is written/referred, then Naheed will face an almost insurmountable barrier to remaining here with his family and Harneet. A sponsorship by Harneet from either within or outside Canada would be stymied for years. An application for a Record Suspension will take a decade after completion of the sentence. I believe that a warning letter to Naheed is sufficient; he will still

> need to apply for permanent residence and as a result will still be in our system and under the watchful gaze of those tasked with enforcing our immigration system for many years. As a result, any risk that Naheed poses is sufficiently mitigated. The alternative is the splitting apart of a family and placing a significant roadblock in a young couple's plans to live together here in Canada.
>
> [See CTR, pp.5-7] [Footnotes omitted]

[5] In response, the Officer rendered the following decision, in a report dated March 15, 2017:

> In accordance with subsection 44(1) of the Immigration and Refugee Protection Act I hereby report that:
>
> [Naheed Karim Virani] is a person who is a foreign national who has been authorized to enter Canada and who, in my opinion, is inadmissible pursuant to:
>
> 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 punishable by a maximum term of imprisonment of at least 10 years, or for which a term of imprisonment of more than six months has been imposed.
>
> This report is based on the following information that the above-named individual:
>
> - Is not a Canadian citizen or permanent resident;
>
> - Was convicted on 15 December 2015 at Calgary, Alberta, of Possession of Cocaine for the Purpose of Trafficking, contrary to section 5(2) of the Controlled Drugs and Substances Act, for which imprisonment for life may have been imposed. On 21 March 2016, he was sentenced to 63 months imprisonment.
>
> [Applicant's Application Record, pp.37-38; CTR, pp.1-2]

[6] The Officer communicated the above Decision to the Applicant under a covering letter dated April 19, 2017:

> Dear Mr. Sharma
>
> Thank you for your fax dated 13 March 2017. I note your comments regarding a request in April 2016 to be advised when/if a s. 44 report was being contemplated. I can confirm that CBSA was contacted by Corrections Canada in February 2017, to enquire about Mr. Virani's immigration situation, as it related to his security classification level at Drumheller institution.
>
> After reviewing the information contained on the file, including your recent submissions, I am of the opinion that Mr. Virani is a foreign national in Canada who is inadmissible under paragraph 36(1)(a) of the Immigration and Refugee Protection Act. Accordingly, I have prepared a report under subsection 44(1). A copy of the report is enclosed for your information.
>
> I have forwarded the report to the supervisor with a recommendation that it be referred to a Minister's delegate for review.
>
> Sincerely,
>
> Robert Oler
>
> Inland Enforcement Officer
>
> [Emphasis added]
>
> [Applicant's Application Record, p.36]

[7] In support of the present judicial review application challenging the Officer's decision, by the following argument, counsel for the Applicant advanced two discrete arguments: the Officer failed to exercise discretion provided by s. 44(1); and failed to address the argument that no action should be taken:

> The Officer in this case fundamentally misunderstood the scope of discretion afforded to him by the legislators or otherwise denied the Applicant natural justice by (a) seemingly refusing to consider the request that he not proceed with preparing a A44 Report; or (b) failing to provide reasons for writing the A44 report. In doing so,

> the Officer failed to demonstrate that he exercised his (admittedly limited) discretion under s. 44(1) of the Act in considering the Applicant's submissions.
>
> [Applicant's Application Record, Memorandum of Argument, paragraph 14, pp.49-50]

II. Failure to Exercise Discretion Provided by s. 44(1)

[8] The Applicant argues that because the word "may" in s. 44(1) of the *IRPA* connotes discretion, the Officer erred by fettering his discretion. The Applicant also argues that the Officer failed to provide adequate reasons for the decision to issue a s. 44(1) report. The main issue is the correct interpretation of the word "may" in s. 44(1) of the *IRPA*.

[9] Counsel for the Respondent argues that, as a matter of law, no discretion exists in the application of s. 44(1), and, in doing so, relies of the Federal Court of Appeal's decision in *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 (*Cha*). In the decision, Justice Décary explained that when determining the extent of discretion afforded by the use of "may" context matters:

> [19] In *Ruby v. Canada (Solicitor General)* (C.A.), [2000] 3 F.C. 589, at pp. 623 to 626, Létourneau J.A. reminded us that the use of the word "may" is often a signal that a margin of discretion is given to an administrative decision maker. It can sometimes be read in context as "must" or "shall", thereby rebutting the presumptive rule in section 11 of the *Interpretation Act* (R.S.C. 1985, c. I-21) that "may" is permissive. It can also be read as no more than a signal from the legislator that an official is being empowered to do something. Even when "may" is read as granting discretion, all grants of discretion are not created equal: depending on the purpose and object of the legislation, there may be considerable discretion, or there may be little.

[10] Justice Décary also observed that Parliament has provided the context for determining the extent of discretion afforded by s. 44(1) of the *IRPA* in the case of foreign nationals:

> [25] One of the conditions Parliament has imposed on a non-citizen's right to remain in Canada is that he or she not be convicted of certain criminal offences (section 36 of the Act). As observed by Sopinka J. in *Chiarelli*, supra, at p. 734, commenting on the former *Immigration Act*,
>
> > This condition represents a legitimate, non-arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country. The requirement that the offence be subject to a term of imprisonment of five years indicates Parliament's intention to limit this condition to more serious types of offences. It is true that the personal circumstances of individuals who breach this condition may vary widely. The offences which are referred to in s. 27(1)*(d)*(ii) also vary in gravity, as may the factual circumstances surrounding the commission of a particular offence. However there is one element common to all persons who fall within the class of permanent residents described in s. 27(1)*(d)*(ii). They have all deliberately violated an essential condition under which they were permitted to remain in Canada. In such a situation, there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada. In the case of a permanent resident, deportation is the only way in which to accomplish this. There is nothing inherently unjust about a mandatory order. The fact of a deliberate violation of the condition imposed by s. 27(1)*(d)*(ii) is sufficient to justify a deportation order. It is not necessary, in order to comply with fundamental justice, to look beyond this fact to other aggravating or mitigating circumstances.
>
> [26] The purpose of section 36 is clear: non-citizens who commit certain types of criminal offences inside and outside Canada are not to enter, or remain, in Canada.

[11] Justice Décary concludes that little discretion arises from the use of "may" in s. 44(1):

> [33] As I see it, in so far as foreign nationals convicted of certain offences in Canada are concerned, the immigration officer, once he is satisfied that a foreign national has been convicted of offences described in paragraph 36(1*)(a)* or 36(2*)(a)* of the Act, is expected to prepare a report under subsection 44(1) of the Act, unless a pardon has been granted, unless the convictions have been reversed, unless the inadmissibility resulted from the conviction of two offences that may only be prosecuted summarily and the foreign national have not been convicted in the five years following the completion of the imposed sentences, or unless the offence is designated as a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*.
>
> […]
>
> [35] I conclude that the wording of sections 36 and 44 of the Act and of the applicable sections of the Regulations does not allow immigration officers and Minister's delegates, in making findings of inadmissibility under subsections 44(1) and (2) of the Act in respect of persons convicted of serious or simple offences in Canada, any room to manoeuvre apart from that expressly carved out in the Act and the Regulations. Immigration officers and Minister's delegates are simply on a fact-finding mission, no more, no less. Particular circumstances of the person, the offence, the conviction and the sentence are beyond their reach. It is their respective responsibility, when they find a person to be inadmissible on grounds of serious or simple criminality, to prepare a report and to act on it.
>
> [36] This view is consistent with that expressed by Sopinka J. in *Chiarelli* (supra). To paraphrase him, this condition (of not committing certain offences in Canada) represents a legitimate, non-arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country. It is true that the personal circumstances of the criminals may vary widely. It is true that the offences vary in gravity, as may the factual circumstances surrounding the commission of a particular offence. But the fact is, they all deliberately violated an essential condition under which they were permitted to remain in Canada. It is not necessary to look beyond this fact to other aggravating or mitigating circumstances.
>
> [37] It cannot be, in my view, that Parliament would have in sections 36 and 44 of the Act spent so much effort defining objective circumstances in which persons who commit certain well

> defined offences in Canada are to be removed, to then grant the immigration officer or the Minister's delegate the option to keep these persons in Canada for reasons other than those contemplated by the Act and the Regulations. It is not the function of the immigration officer, when deciding whether or not to prepare a report on inadmissibility based on paragraph 36(2)*(a)* grounds, or the function of the Minister's delegate when he acts on a report, to deal with matters described in sections 25 (H&C considerations) and 112 (Pre-Removal Assessment Risk) of the Act (see *Correia* at paragraphs 20 and 21; *Leong* at paragraph 21; *Kim* at paragraph 65; *Lasin v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1655, 2005 FC 1356 at paragraph 18).
>
> [38] The intent of Parliament is clear. The Minister's delegate is only empowered under subsection 44(2) of the Act to make removal orders in prescribed cases which are clear and non-controversial and where the facts simply dictate the remedy. According to the Manual (ENF 6, paragraph 3), it is precisely because there was nothing else to consider but objective facts that the power was given to the Minister's delegate to make the removal order without any need to pursue the matter further before the Immigration Division. In the circumstances, the use of the word "may" does not attract discretion. "May" is no more than an enabling provision, nothing more, to use the words of Létourneau J.A. in *Ruby* (supra), "than a signal from the legislator that an official is being empowered to do something". It may be that the Minister or his delegate, as part of their executive responsibilities, will prefer to suspend or defer making the deportation order, where, for example, the person is already the subject of a deportation order, has already made plans to leave Canada or has been called as a witness in a forthcoming trial.
>
> [Emphasis added]

[12] Thus, the paramount conclusion arising from the decision in *Cha*, is that, once an immigration officer takes action pursuant to s. 44(1) and is satisfied that a foreign national has been convicted of an offence pursuant to s. 36(1)(a) of the *IRPA*, the officer is "expected" to prepare a report under s. 44(1) of the *IRPA* (see *Cha* at paragraph 33).

[13] As a result, I agree with counsel for the Respondent's argument that no discretion is available to an officer when taking action pursuant to s. 44(1). Thus, as decided in *Cha* at

paragraph 40, if an individual wishes to invoke humanitarian and compassionate considerations, a request may be made to the Minister of Immigration, Refugees and Citizenship (the Minister) pursuant to s. 25 of the *IRPA*.

[14] Ancillary to the main argument under consideration, counsel for the Applicant relies on *Iamkhong v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 1349, to argue that, because the Officer decided to take action pursuant to s. 44(1), reasons were required to be given. In *Iamkhong*, Justice Zinn explained:

> [32] The reasons need not be comprehensive nor analyze every factor, 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.

[15] As stated above, the Officer did provide brief reasons for the decision to report the Applicant pursuant to s. 44(1) of the *IRPA*. I agree with counsel for the Respondent that no further reasons than those provided were necessary.

[16] As a result, counsel for the Applicant's "failure to exercise discretion pursuant to s. 44(1)" argument is dismissed.

III. Failure to Address the Argument that No Action should be Taken

[17] Counsel for the Applicant argues that the Officer had a choice. Regardless of the decision in *Cha*, nevertheless, the application of discretion provided by policy was available for use by the Officer. That is, rather than take action to write the report, it was open to the Officer to take no action. This option is made available by a grant of authority from the Minister to immigration officers in the Directive "ENF 5 Writing 44(1) Reports", dated 2013-08-20, tabled to the Record of the present Application by counsel for the Applicant during the course of the hearing of the

present Application on November 9, 2017. By the Minister's Directive, the following grant of authority is provided to immigration officers:

> 8.1. Considerations before writing an A44(1) report
>
> The fact that officers have the discretionary power to decide whether or not to write an inadmissibility report does not mean that they can disregard the fact that someone is, or may be, inadmissible, or that they can grant status to that person under A21 and A22.
>
> Rather, this discretion gives officers flexibility in managing cases where no removal order will be sought, or where the circumstances are such that the objectives of the Act may or will be achieved without the need to write a formal inadmissibility report under the provisions of A44(1).
>
> However, note that the scope of discretion varies depending on the inadmissibility grounds alleged, whether the person concerned is a permanent resident or a foreign national, and whether the report is to be referred to the Immigration Division.
>
> For example, in the case of *Minister of Public Safety and Emergency Preparedness v. Cha* (2006 FCA 126), a case involving a foreign national inadmissible under s. 36(2)(a), the Federal Court of Appeal held that in spite of the use of the word "may" in the wording of subsection A44(2), there are limits to the discretion afforded to officers and Minister's delegates. The court held that with respect to foreign nationals inadmissible for criminality or serious criminality, officers and Minister's delegates have limited discretion under s. 44(1) and (2) of the Act. The court outlined that the particular circumstances of the foreign national, the nature of the offence, the conviction, and the sentence are beyond the scope of the discretionary power of the officer when considering whether or not to write an A44(1) report for criminality or serious criminality against a foreign national.
>
> Officers should carefully consider the consequences of writing or not writing a report given that their decision may have an impact on possible future dealings with the person.
>
> […]

8.3. Special considerations for security and criminality inadmissibilities

Cases involving inadmissibilities for criminality, security, war crimes and crimes against humanity (as described in A34, A35, A36 and A37) are to be treated with utmost seriousness. In *Cha*, Mr. Justice Décary explained that Parliament's intention in drafting *IRPA* was to make security a top priority for immigration law enforcement officials. Although the above factors are always to be considered when writing an A44(1) report, the officer must always be mindful of the various objectives of the *IRPA*, in particular A3(1)*(h)* and *(i)*. In cases of criminal inadmissibility, the scope of discretion enjoyed by the officers making a decision regarding whether or not to write an A44(1) report will be narrower. The following factors are to be considered when making a decision on writing an A44(1) report in cases of criminal inadmissibilities.

- In minor criminality cases, is a decision on rehabilitation imminent and likely to be favourable?
- Has the permanent resident been convicted of any prior criminal offence? Based on reliable information, is the permanent resident involved in criminal or organized criminal activities?
- What is the maximum sentence that could have been imposed?
- What was the sentence imposed?
- What are the circumstances of the particular incident under consideration?
- Did the conviction involve violence or drugs?

[…]

CIC has been designated the authority to write reports for inadmissibilities except in circumstances where an inadmissibility on grounds involving A34 (security), A35 (human or international rights violations) and A37 (organized criminality) has been identified. Where these inadmissibilities have been identified, the case is to be referred to the CBSA office, which will make a decision on pursuing the allegation. For further instructions on this process, see ENF 7, section 7.

> In essence, it is important for the officer to seriously consider whether the information might be important for future dealings with the person and to weigh the longer-term consequences of not doing so. These impacts include, but are not limited to the following: the person's eligibility to claim refugee status at a later date; access to the Pre-Removal Risk Assessment (PRRA) stream; future primary inspection line (PIL) referrals; and the safety and security of officers dealing with this individual in subsequent investigations.
>
> In rare instances, officers may choose not to prepare a report regarding a person who, in their opinion, is inadmissible on grounds involving security (A34), violation of human or international rights (A35), serious criminality (A36(1)) or organized criminality (A37). In these cases, officers should notify their supervisor in writing, and enter a Type 01 non-computer-based (NCB) "Watch For" into the Field Operational Support System (FOSS). This will ensure a long-term historical record of the decision and will generate future hits should the person concerned return to Canada at a later date. The NCB entry should include full details of the inadmissibility, a brief account of what happened, the officer's rationale for not writing the A44(1) report, and the officer's initials or name.
>
> [Emphasis added]

[18] Counsel for the Respondent argues that *Cha* is binding on this Court and the Minister's Directive is not. In my opinion, it is not the Court's view of the Minister's grant of authority that is important, it is an officer's understanding that the grant of authority exists for consideration and application that is important. The grant of authority is meant to guide an officer in reaching the potential decision not to write a report pursuant to s. 44(1) of the *IRPA*.

IV. Conclusion

[19] The fact of the matter is that the Officer did not respond to counsel for the Applicant's primary argument that the Minister's grant of authority should be applied to come to the conclusion that no action should be taken. As stated above, the only words provided by the Officer in this respect are in the April 19, 2017 report of the decision: "after reviewing the

information contained in the file, including your recent submissions, I am of the opinion that Mr. Virani is a foreign national in Canada who is inadmissible under paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*".

[20] To clarify counsel for the Applicant's opinion on the way in which the Officer failed in delivering the decision under review, the following exchange took place during the course of the hearing of the present Application:

> Counsel for the Applicant: I believe that the Officer was under the impression that his discretion is extinguished for both paths. That is the only fair reading of the section 44 report and the ex post facto communication April 19, 2017.
>
> The Court: …one act being not to write, the other is to write. Is that what you are saying?
>
> Counsel for the Applicant: Correct sir.
>
> [Federal Court Digital Recording at 01:53:08]

[21] Upon considering counsel for the Applicant's response, there is no evidence on the record to support the belief that the Officer was under the "impression" described. Thus, counsel for the Applicant offered only speculation with respect to the Officer's decision-making.

[22] As a matter of law as described above, the Officer had no discretion to apply in taking action to write the report. Therefore, in my opinion, speculation is not warranted with respect to the manner in which the Officer took action to write the report; the action taken apparently conformed to the law. However, I find that speculation is warranted as to why the Officer failed to acknowledge and act on counsel for the Applicant's request that no action be taken.

[23] The decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47 describes the obligations that the Officer was required to meet in delivering the decision under

review: “[i]n judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process”. I find that the Officer failed to justify why counsel for the Applicant’s request was not addressed, and, as a result, I also find that the Officer’s decision-making was not transparent. For these reasons I find that the decision under review is unreasonable.

JUDGMENT IN IMM-1945-17

THIS COURT'S JUDGMENT is that the decision under review is set aside and the matter is referred back for redetermination by a different decision-maker.

There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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