Federal Court Cour fédérale

Date: 20180523

Dockets: IMM-3265-17
IMM-4316-17

Citation: 2018 FC 534

Ottawa, Ontario, May 23, 2018

PRESENT: The Honourable Mr. Justice Barnes

Docket: IMM-3265-17

BETWEEN:

ADE YOANDA MOHAMMAD

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Docket: IMM-4316-17

AND BETWEEN:

ADE YOANDA MOHAMMAD

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ade Yoanda Mohammad, brings two related applications for judicial review before the Court. His first application challenges a decision rendered by a Minister's Delegate [Delegate] under subsection 44(2) of the *Immigration Refugee and Protection Act*, SC 2001, c 27 [IRPA], referring his case for an admissibility hearing to the Immigration Division. The second application concerns an earlier decision by an Inland Enforcement Officer [Officer] to write an admissibility report under subsection 44(1) of the IRPA and to refer Mr. Mohammad's case to the Minister's Delegate for consideration. A motion to extend time to file the second application was included within Mr. Mohammad's Application for Leave and Judicial Review and the extension was granted with the leave order issued on January 17, 2018.

[2] This single set of Reasons will be filed in each of the application files.

I. The Officer's Assessment under Subsection 44(1)

[3] Absent the contrary views expressed in a number of decisions from this Court and the Federal Court of Appeal, I would have found that the writing and transmission of a subsection 44(1) report is not reviewable on judicial review. That provision triggers only an investigation that may contain a recommendation to the Minister's Delegate to either refer the case or not to the Immigration Division for an admissibility hearing. The Delegate is the decision-maker in the sense that she can accept or reject the subsection 44(1) recommendation. It is the Delegate's decision to refer a case to the Immigration Division that is material and reviewable. This is supported by the nature of the documentation that is completed in conducting a section 44

review. The so-called Highlights Report requires the subsection 44(1) Officer to provide basic personal information concerning the subject of the inquiry. It also seeks information bearing on admissibility, a brief description of settlement, employment details, educational history, financial standing, and other pertinent information. The form and the related guidelines also contemplate an interview. The Highlights Report concludes with a section for additional remarks, justifications, and actions. The Officer is directed to make a recommendation to the Delegate (see box 72). The relevant passages from the ENF 5 Manual similarly refer to the Officer's "recommendation" to the Delegate who then makes "the final decision" about whether or not to refer the matter to the Immigration Division.

[4] In addition to the completion of the Highlights Report, the practice appears to be for the subsection 44(1) Officer to provide additional supporting documentation for the consideration of the Delegate. This will typically include a subject interview report, records bearing on the relevant criminal and correctional history, and all submissions sought and obtained from the subject.

[5] It is only then that the Delegate signs off on the Highlights Report by making a decision among several available options including a referral to the Immigration Division, the issuance of a temporary resident permit, or the imposition of conditions.

[6] I accept, nevertheless, that considerable jurisprudence from this Court and some *obiter* commentary from the Federal Court of Appeal support the view that the writing and transmission of a subsection 44(1) report is a discretionary exercise that may be judicially reviewed on

fairness and reasonableness grounds. This has led to the practice – evident in this case – of challenging both the Officer's recommendation to the Minister's Delegate and the Delegate's decision to refer the matter to the Immigration Division. This seems to me to be a duplicative and unnecessary exercise but it is sufficiently entrenched in our jurisprudence that I am not prepared to depart from it. It will be up to the Federal Court of Appeal to address the problem in an appropriate future case.

[7] In this case, Mr. Mohammad argues that the Officer fettered her decision by ostensibly concluding her subsection 44(1) report before the completion of the required investigation. He also contends that the Officer "cherry picked" from the available record and failed to fully engage with the mitigating evidence. Neither of these arguments is legally tenable.

[8] The record before me indicates that Mr. Mohammad was interviewed by the Officer on April 27, 2016. The Officer signed off on the subsection 44(1) Highlights Report on May 3, 2016. All of the supporting documentation was then sent to the Delegate for consideration. The Delegate rendered a final decision on July 10, 2017. Inasmuch as the Delegate had all of the available evidence at the time of his decision, the Officer's treatment of the evidence was effectively rendered moot. I also reject the suggestion that the Officer had a duty to closely reflect and comment on the gathered evidence. In this context, the Officer was simply conducting an investigation in support of a recommendation and had no obligation to mention every mitigating fact raised on behalf of Mr. Mohammad in her report to the Delegate. It was the role of the Delegate to carry out an assessment of the evidence to determine if a referral to the Immigration Division was warranted.

II. Delegate's Decision

[9] Counsel for Mr. Mohammad argues that the Delegate's reasons for referring the case to the Immigration Division provide insufficient support for the decision. He contends that the reasons fail to address many of the mitigating circumstances that Mr. Mohammad raised, and, in the result, they lack the degree of transparency and justification required by the *Dunsmuir* standard: see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

[10] Although the Delegate's reasons set out in his Note to File of July 10, 2017 are brief and do not expressly touch on all of the available evidence, I am satisfied that they are sufficient to understand the basis for the decision. The Delegate took account of the length of time Mr. Mohammad had lived in Canada. He also noted the presence of the immediate family in Canada but observed that a quantity of narcotics was found in the family home. By implication this suggested that Mr. Mohammad's family was, at best, not particularly attentive to his behaviour. The Delegate also had reservations about Mr. Mohammad's supposed rehabilitation in the face of the escalation of his trafficking activity over the years and his admitted readiness to resort to violence if required.

[11] The Delegate's decision was also informed by the observations and recommendations of the Officer. Those matters included the following:

(a) Mr. Mohammad was free on bail when the most recent convictions were entered;

(b) Mr. Mohammad and his mother attempted to minimize the gravity of his criminal conduct;

(c) Mr. Mohammad presented with an indifferent attitude to the criminal justice system during his intake interview;

(d) although Mr. Mohammad had no recorded violent behaviour, he admitted a willingness to fight in the drug subculture;

(e) notwithstanding his lengthy Canadian residency, his nonstop criminal activities since 2012 justified a removal from Canada; and

(f) the interview report indicated cooperation but contained no expression of remorse.

[12] In the end, the Delegate made the referral to the Immigration Division because the severity of Mr. Mohammad's crimes outweighed the hardship he could face if removed to Indonesia.

[13] Although there were details from Mr. Mohammad's correctional history and from other third-party sources that provided a somewhat more benign assessment of his prospects, the Delegate was not obliged to accept them. Given the narrow confines of the Delegate's discretion to consider factors outside of Mr. Mohammad's criminality, these reasons are legally sufficient. On this issue, I am guided by the views of my colleague Justice Patrick Gleeson in *Wu v Canada*, 2016 FC 621, [2016] FCJ No 1045, where he dealt with a similar argument in the following way:

> [29] The decision not to grant a TRP because the applicant failed to discharge his onus of demonstrating compelling reasons is a decision that was within the range of possible and acceptable outcomes (*Dunsmuir v New Brunswick*), [2008] 1 SCR 190 at para 47 [*Dunsmuir*]).

> [30] The Officer's inferences and findings of fact were reasonably open to the Officer based on the evidence. The applicant's disagreement with the findings is not a basis upon which this Court will interfere with exercise of discretion by the Officer.
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> [31] Similarly, the applicant's argument that the reasons do not demonstrate sufficient analysis reflects an expectation of longer and more comprehensive reasons. Again this is not, in and of itself, a ground for judicial review (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708 at paras 14, 16, 18). The reasons allow this Court to understand why CIC made its decision and permits the Court to determine whether the conclusion is within the range of acceptable outcomes.

[14] In *Apolinario v Canada (Public Safety and Emergency Preparedness),* 2016 FC 1287, [2016] FCJ No 1297, Justice Susan Elliott dealt with an argument similar to the one that Mr. Mohammad raised. The applicant complained that the section 44 analysis was deficient inasmuch as it paid "lip service" to the asserted mitigating factors and looked "exclusively at the offence". Justice Elliott rejected the argument largely because the available discretion under subsections 44(1) and 44(2) was substantially constrained by section 36 and did not include a humanitarian dimension. In that case, the Inland Enforcement Officer carried out much of the evidentiary analysis, which the Minister's Delegate ultimately adopted. Justice Elliott concluded as follows:

> [49] While the Applicant takes issue with the s 44 Remarks and the decisions of the Officer and the Minister's Delegate my review of the subsection 44(1) and (2) reports and the supporting documentation, including all the documents from the criminal court and the submissions made at that time on behalf of the Applicant indicates the relevant factors were considered and the serious criminality was weighed. That the Applicant disagrees with the result does not mean the decisions were unreasonable, it simply means the Applicant would have weighed the factors differently. It is not my role to re-weigh the evidence.

> [50] I am comfortable in finding that any limited level of discretion possessed by the Officer and the Minister's Delegate was properly and reasonably exercised by each of them. Their decisions follow the statutory provisions and, on these facts, I find they fall within the range of possible, acceptable outcomes defensible on the law and facts. The section 44 decisions under review are, accordingly, reasonable.

[15] Justice Elliott's analysis seems to me to be generally consistent with the views of Justice Yves de Montigny in *Sharma v Canada (Public Safety and Emergency Preparedness),* 2016 FCA 319, [2017] 3 FCR 492, where the purpose of subsections 44(1) and 44(2) was described as follows:

> [33] …I agree with the respondent that the inadmissibility report and the case highlights are more in the nature of *pro forma* documents, whose essential purpose is to list relevant information from the file (revolving around the criminal conviction and related objective facts) and to provide a brief rationale for the Officer's actions and recommendation. They are clearly distinguishable from case review recommendations in the context of public danger opinion and internal risk opinions, which are more akin to advocacy tools.
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> …
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> [37] …Yet, as previously noted, the decisions to make a report and to refer it to the ID are administrative in nature, and do not translate to any change in status for the appellant. Only the ID can make a removal order in this case, and the appellant has a number of other recourses available to him before actually being removed from the country (applications for judicial review of the report, of the referral and of the ID decisions, a pre-removal risk assessment, and an H&C application)…

[16] Also see *Wajaras v Canada (Citizenship and Immigration),* 2009 FC 200, [2009] FCJ No 269 (QL).

[17] Given the limited discretion afforded by subsection 44(2) and the administrative function served by the referral process it creates, I am satisfied that the Delegate’s reasons in this case were compliant with the requirements in *Dunsmuir*, above. The application challenging the Delegate’s decision is accordingly dismissed.

[18] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT in IMM-3265-17 and IMM-4316-17

THIS COURT'S JUDGMENT is that these applications are dismissed.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3265-17
STYLE OF CAUSE:	ADE YOANDA MOHAMMAD v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND DOCKET:	IMM-4316-17
STYLE OF CAUSE:	ADE YOANDA MOHAMMAD v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	CALGARY, ALBERTA
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