Federal Court  Cour fédérale

Date: 20181128

Docket: IMM-5511-17

Citation: 2018 FC 1192

Ottawa, Ontario, November 28, 2018

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

KEVIN MUKARAKATE

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

AMENDED JUDGMENT AND REASONS

[1] This is an application for judicial review of a November 23, 2017 decision made by an Immigration, Refugees and Citizenship Canada ("IRCC") senior decision maker ("Decision-Maker") refusing the Applicant's request for reconsideration ("Reconsideration Decision") of a December 23, 2014 danger opinion made pursuant to s 115(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA") and which found that the Applicant constitutes a danger to the public of Canada.

Background

[2] The Applicant is a citizen of Zimbabwe. In July 2001, when he was 10 years old, he came to Canada with his mother. A year later he and his mother were determined to be Convention refugees. They became permanent residents in December 2003. The Applicant's first criminal conviction was in 2006 when he was 15 years old. Ultimately, many convictions were entered against him between 2006 and 2013, both as a youth and as an adult. These convictions included robberies, assault, and possession of drugs for purposes of trafficking, as well as convictions for failing to appear or to comply with Court orders. Following a conviction for robbery, the Applicant was determined to be inadmissible, pursuant to s 36(1)(a) of the IRPA, and a removal order was issued against him in September 2011. At that time, the Applicant was 20 years old. He was not represented by counsel at the admissibility hearing and did not appeal the removal order to the Immigration Appeal Division ("IAD"). In April 2014, a Notice of Intention to seek a danger opinion against the Applicant was issued pursuant to s 115(2)(a) of the IRPA. The Applicant was not represented by counsel during the danger opinion process and submitted a hand-written two page letter in response. On December 23, 2014, a Minister's Delegate ("Delegate") issued the danger opinion finding the Applicant to be a danger to the public in Canada ("Danger Opinion"). The Applicant did not seek judicial review of the Danger Opinion.

[3] Upon completion of his sentence for his last conviction, the Applicant was transferred to immigration detention. In June 2014, he was released on conditions, including monthly reporting to Canada Border Services Agency ("CBSA"). He reported until April 2016. As a

result of his failure to report thereafter, he was arrested on July 29, 2016 and was detained for removal.

[4] The Applicant then contacted Legal Aid and retained counsel. Upon review of the Applicant's immigration file, his counsel filed an application for an extension of time to appeal the removal order to the IAD. The Applicant also sought to reopen the Danger Opinion. He requested a deferral of removal pending the determination of these two requests, which was denied. The Applicant then filed an application for leave for judicial review of the decision refusing the deferral and brought a motion seeking a stay of removal (IMM-4831-16). I granted an interim stay on November 19, 2016 to permit the IAD to consider the request for an extension of time to appeal the removal order. The request was refused by the IAD on December 2016. A new removal date of January 28, 2017 was set.

[5] The Applicant then filed an application for leave and judicial review of the IAD's decision refusing to grant him an extension of time (IMM-5231-16).

[6] On January 17, 2016, a Minister's Delegate refused the Applicant's request to reconsider the Danger Opinion. The Applicant filed an application for leave and judicial review of that decision (IMM-288-17) and sought a stay of removal in relation to both matters.

[7] On January 27, 2017, Justice O'Reilly granted the stay motion and, subsequently, granted leave for judicial review with respect to IMM-288-17, the refusal to reconsider the Danger

Opinion. He had previously dismissed the request for leave with respect to IMM-5231-16, the challenge to the IAD's refusal to grant an extension of time to appeal the removal order.

[8] Prior to the hearing of IMM-288-17, which concerned the refusal to reconsider the Danger Opinion, the parties reached a settlement on specified terms. As a result, the application for judicial review in IMM-288-17 was discontinued and the Applicant's request to reopen the Danger Opinion was remitted back for redetermination. Updated submissions were requested and provided. By a decision dated November 23, 2017, the Decision-Maker, who is presumably another Minister's Delegate, again refused the request. This is the decision now under review before me.

[9] Subsequently, the Applicant brought a motion seeking to continue IMM-288-17 and consolidate it with IMM-5511-17, on the basis that the Decision-Maker's decision amounted to an effective repudiation of the terms of settlement. By Order dated February 7, 2018, Justice Mosley denied the motion finding that any alleged legal or factual errors could be addressed in this application.

Decision Under Review

[10] The Decision-Maker listed the reasons why the Applicant sought to have the Danger Opinion reopened and reconsidered, which included the following: the Applicant did not understand and was unable to participate in the danger opinion hearing due to mental illness, lack of education and functional illiteracy; he had not been represented by and did not understand that he had the right to counsel; his childhood history of sexual and physical abuse resulting in post-

traumatic stress disorder ("PTSD") was not before the Delegate for consideration; arguments had not been presented to explain that the Applicant's past convictions fell below the threshold of a particularly serious crime as required by Article 33(2) of the Convention and Protocol Relating to the Status of Refugees, nor as to the Applicant's risk profile, or the balancing of the danger, risk and humanitarian and compassionate ("H&C") considerations; and, no convictions had been entered against the Applicant since prior to the issuance of the danger opinion. The Decision-Maker referred to *Immigration, Refugees and Citizenship Canada, ENF 28, Ministerial opinions on danger to the public, nature and severity of the acts committed and danger to the security of Canada*, c 7.16, Reconsiderations of danger opinions ("ENF 28" or the "Manual"), stating that it explicitly recognizes the possibility that a danger opinion can be reopened and reconsidered. However, the Decision-Maker found that the new evidence was not material and, on that basis, refused to reopen that decision.

[11] Amongst other things, the Decision-Maker stated that the Applicant had chosen not to retain counsel and this was not a reason to reopen the Danger Opinion. While the Applicant's childhood history of abuse was unfortunate, it was known to him when the Danger Opinion was made and he chose not to disclose it. In any event, it was unlikely to have changed the decision as it was not tied to a risk, and while it may have been mentioned in the humanitarian and compassionate considerations section, it was unlikely that it would have been a determinative factor. Further, while the evidence of the Applicant's PTSD was not before the Delegate, this did not make the Applicant less of a danger to the public, nor did the Applicant explain how this diagnosis would result in him being perceived as someone with a mental health issue who would face risk on that basis in Zimbabwe. As to the Applicant's mental health condition worsening

upon return, the Decision-Maker found that there was insufficient evidence that the Applicant was being treated for his condition in Canada.

[12] The Decision-Maker also stated that although the Applicant had not been convicted of a criminal offence since December 2013, he had gone underground to avoid CBSA resulting in a warrant issued for his arrest. This was not indicative of someone who had completed the rehabilitation process, nor had a plan been presented in that regard.

[13] As to the submission that there had been no argument made to the Delegate on the balancing requirement, or to explain that the Applicant's past convictions fall below the threshold of particularly serious crimes, the Decision-Maker stated that Applicant had been given ample opportunity to have all of the circumstances of the case weighed and considered and had made submissions on two different occasions. Those submissions were clear and intelligible, demonstrating that he was aware of the consequences of the Danger Opinion, and were taken into consideration by the Delegate.

[14] Although the Applicant identifies six issues, these can be captured by asking whether the Decision-Maker's refusal to reopen the danger opinion was reasonable and whether the Decision-Maker breached the duty of procedural fairness based on the legitimate expectations of the Applicant that the danger opinion would be reconsidered. However, in my view, this matter must be returned for reconsideration based on a preliminary procedural fairness issue.

[15] Specifically, subsequent to the hearing of this matter, it came to the attention of the Court that ENF 28 appeared to have been revised on November 21, 2017, two days before the date of the Reconsideration Decision. Those revisions included s 7.16, reconsideration of danger opinion, which was at issue in this matter.

[16] As the CTR did not include a copy of ENF 28 as relied upon by the Decision-Maker and as the hand-in provided to the Court at the hearing by counsel for the Applicant was the older version of the ENF 28 Manual, on November 7, 2018, I issued a direction alerting the parties to this point and advised, should they wish to do so, that they could provide written submissions as to the relevance, if any, of the ENF 28 Manual revisions, to their respective positions.

[17] Both parties provided responses.

[18] The Respondent took the position that the changes to ENF 28, s 7.16 further supported its position. It pointed out that the Applicant's main argument regarding the Manual was that, as worded in its previous version, it left no discretion to the Decision-Maker in determining whether to reopen the Danger Opinion if there was new evidence or a breach of a principal of natural justice arose and that the Decision-Maker had erred in not re-opening the Danger Opinion as the Applicant had provided new evidence. However, in its submissions the Respondent had disagreed with that interpretation. The Respondent had argued the Decision-Maker was to determine whether the new evidence was truly "new" and whether it was sufficiently material such that it warranted a reconsideration of the Danger Opinion. The Decision-Maker was entitled to consider the substance of the evidence submitted, including the materiality, probative

value, and relevance of the evidence to determine if the evidence warranted reconsideration of the Danger Opinion. The Respondent had argued that this approach was appropriate as it followed the long standing Raza approach to new evidence.

[19] The Respondent submitted that the new version of ENF 28, s 7.16, essentially codified its arguments. The new version provides that the Decision-Maker must determine if the new evidence meets the criteria of reliability, relevance, materiality, and newness. According to the new Manual provisions, if the Decision-Maker finds that the material provided in a request to reopen does not meet the requisite criteria, there is no requirement to reopen the decision. Further, although the second criteria of a violation of a principle of natural justice remains unchanged, the provisions in the Manual no longer state that the Decision-Maker "will reopen" the danger opinion. The new provisions provide discretion to the Decision-Maker based her own assessment of the evidence provided. Further, the changes made to Manuel ENF 28, s 7.16, also supported the Respondent's position that the Decision-Maker did not err in her application of the Manual related to the reconsideration of Danger Opinion and that the Respondent's position that the Applicant's evidence was reasonably considered by the Decision-Maker. The analysis taken by the Decision-Maker followed that set out in the Manual.

[20] Conversely, the Applicant submitted that the applicable version of the Manual was the version in force when the first refusal to reconsider was made as this was the moment when the Applicant's procedural rights vested. That decision was quashed pursuant to the settlement agreement and returned to a different delegate for redetermination. In any event, to allow the Respondent to rely on a last minute change in the Manual, without notice, would severely

prejudice the Applicant and would be procedurally unfair. While there is nothing in the Reconsideration Decision to suggest that the Decision-Maker was aware of the revisions to the Manual, if she did rely on the revised Manual, then the duty of procedural fairness required that she advise the Applicant and provide him with an opportunity to respond and make amended submissions.

[21] I note that there is no way of knowing, with certainty, if the Decision-Maker relied on the revised version of ENF 28, s 7.16. However, the Respondent asserts that she did and her reasons are premised on her finding that "after reviewing the new evidence presented, I do not find it material, in the sense that the Decision-Maker may have come to a different conclusion had it been known at the time of the decision. I have therefore decided that the danger in opinion will not be reopened". This tracks the wording of the new version of ENF 28, s 7.16 criteria for the assessment of new evidence which includes:

> c) Materiality: Is the evidence material, in the sense that the decision-maker may have come to a different conclusion if it had been known?

[22] The Decision-Maker also stated that in making her decision, she had reviewed the Applicant's November 17, 2016 submissions seeking a reconsideration. These submissions pre-dated the issue of the revised ENF s 7.16, on November 21, 2017, and, accordingly, the Applicant could not have framed its submission to take into account the revised Manual provisions.

[23] In my view, if the Decision-Maker intended to rely on a version of ENF s.7.16, which post-dated the Applicant's submissions, procedural fairness required that she alert the Applicant

to this and afford him the opportunity to address this and revise his submissions (see *Gill v Canada*, 2012 FC 1522 at para 44). The significance of the failure to do so is demonstrated by the Respondent's acknowledgment that the Applicant's main argument before this Court regarding the Manual was that, as worded in its previous version, it left no discretion for the Decision-Maker in determining whether to reopen the Danger Opinion if new evidence was submitted or a principle of natural justice arose. The Manual had previously stated that the Decision-Maker "will reconsider the original opinion" if either of those criteria were met. Thus, the Applicant argued that the Decision-Maker erred in not reopening the Danger Opinion as he had provided new evidence. I note that the Applicant also based its legitimate expectations submissions on the former version of the Manual.

[24] For these reasons, the Redetermination Decision cannot stand.

JUDGMENT IN IMM-5511-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted.

2. There shall be no order as to costs.

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5511-17
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STYLE OF CAUSE:	KEVIN MUKARAKATE v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
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