Federal Court  Cour fédérale

Date: 20191203

Docket: IMM-1043-19

Citation: 2019 FC 1555

Ottawa, Ontario, December 3, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

HARJINDER SINGH DHATT

Applicant

and

THE MINISTER OF PUBLIC SECURITY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Canada Border Services Agency [CBSA], issued under s 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] on January 12, 2019, and sent to the Applicant on February 4, 2019, referring the Applicant to the Immigration Division [ID] for an admissibility hearing on the basis of serious criminality under s 36(1)(b) of IRPA [the Decision].

[2] As explained in greater detail below, this application is dismissed, because I find no abuse of process by CBSA as alleged by the Applicant, and I find the Decision to be reasonable.

II. **Background**

[3] The Applicant, Harjinder Singh Dhatt, is a 46 year-old citizen of India, who landed in Canada as a permanent resident [PR] on December 6, 2000. His spouse, mother, and two sons live with him in Canada, while his brother lives in India.

[4] The Applicant works as a truck driver. In 2009, he was offered money to transport cocaine to Nevada. He was caught with the cocaine, and he was convicted by the US District Court in Nevada for possession of a controlled substance with the intent to distribute. The Applicant plead guilty and was sentenced to serve 51 months in prison. On June 27, 2011, he was released early for good behaviour.

[5] As the Applicant's PR card expired while he was serving his sentence, he was deported from the US to India upon his release. He applied for a PR travel document to return to Canada, but his application was refused on the basis that he had not satisfied his residency requirements under s 28 of IRPA. The Global Case Management System [GCMS] notes dated June 8, 2011 reflect the visa officer's further conclusion that the Applicant was a person described by s 36(1)(b) of IRPA (i.e. inadmissible to Canada based on serious criminality) because of his US conviction. At that time, the CBSA did not issue any report under s 44 of IRPA related to the Applicant's criminality.

[6] On July 27, 2011, the Applicant appealed the visa officer's conclusion regarding his residency obligations to the Immigration Appeal Division [IAD]. On April 17, 2013, before the IAD hearing, he applied to add the issue of serious criminality to the appeal. CBSA opposed this application on the basis that the IAD had no jurisdiction to hear such an appeal, as no removal order had issued against the Applicant, and no report on inadmissibility had been prepared. The IAD agreed and denied the Applicant's request to consider the additional ground of appeal. He did not seek judicial review of that decision.

[7] On June 19, 2013, during the Applicant's IAD proceeding, the *Faster Removal of Foreign Criminals Act,* SC 2013, c 16 [Faster Removal Act] came into force. This series of amendments to IRPA, among other things, removed the right to appeal to the IAD from a finding of inadmissibility based on certain serious criminality under s 36(1)(b).

[8] In a decision dated October 1, 2013, the IAD granted the Applicant's residency appeal based on humanitarian and compassionate [H&C] grounds, taking into account the following considerations:

A. He showed genuine remorse, especially for the upheaval that his crime caused his family, mitigating his criminality;

B. He had no other convictions besides the one at issue;

C. The bests interests of his children weighed heavily in favour of the Applicant remaining in Canada, because:

i. His older son has asthma and another medical condition that requires monitoring by a specialist;

ii. Medical costs are higher in India for his son's care, and his salary there would not be able to cover same;

iii. The asthma would be worsened in India by pollution, if the children were forced to relocate or even to travel to visit their father;

iv. The children would suffer from being separated from their father;

v. The children would not be able to relocate to India because they can barely read or write Punjabi; and

D. The Applicant has significant family ties to Canada, while his spouse has no family ties here. Therefore, she had to rely on his sister for financial support when he was incarcerated.

[9] Having been found admissible by the IAD, Mr. Dhatt returned to Canada in September 2014 and reunited with his family. The CBSA took no steps to remove him between 2014 and 2018.

[10] On April 12, 2018, the Applicant applied for Canadian citizenship. On April 23, 2018, he received a letter from the CBSA, informing him that a s 44(1) report had been issued on October 23, 2013—three weeks after the IAD had granted his residency appeal. The letter invited the Applicant to make submissions why a removal order should not be sought.

[11] On May 15, 2018, the Applicant responded to CBSA, arguing that it was a breach of the principles of fairness to issue the s 44(1) report years after the CBSA learned about his criminality, and after the amendments to IRPA eliminated his right to appeal. He also made submissions on H&C grounds similar to those the IAD had previously considered. The Applicant made further submissions on May 29, 2018, explaining his wife had been in a car accident, as a result of which she was unable to return to work.

[12] On October 30, 2018, CBSA sent another letter, identical to the one sent on April 23, 2018, but attaching another s 44(1) report issued on October 29, 2018. At the hearing of this application for judicial review, counsel for both parties offered the explanation that this second s 44(1) report was prepared because the Applicant was not in Canada at the time the first report was prepared in October 2013. Section 44(1) entitles a CBSA officer to prepare such a report only in relation to a permanent resident or foreign national who is in Canada.

[13] The Applicant was again invited to make submissions as to why a removal order should not be sought. On November 20, 2018, the Applicant made further submissions, asking that his May 2018 submissions be considered. He also referred to a change in circumstances, in that he had applied to Immigration, Refugees and Citizenship Canada for criminal rehabilitation. In the November 2018 submission, the Applicant again argued it was contrary to principles of fairness to seek to remove him based on his criminality, now that he could not appeal such a determination. He asserted the CBSA consciously chose not to report him for criminal inadmissibility when he appeared in front of the IAD in 2013, some six years ago, when he would have enjoyed such a right of appeal.

[14] On January 12, 2019, CBSA issued a s 44(2) report, referring the Applicant to an admissibility hearing before the ID. This is the Decision that is the subject of this application for judicial review.

III. **Decision under Review**

[15] The Decision consists of a recommendation by a reporting officer and a review by a delegate of the Respondent Minister.

[16] The reporting officer summarized the Applicant's immigration history, including the 2013 IAD decision not to add criminal inadmissibility as a ground of appeal, and referred to his counsel's May 2018 submissions including H&C considerations. The officer also noted that CBSA was unaware of the Applicant having any additional criminal convictions or charges. The officer observed that the Applicant knowingly involved himself in his offence, doing so for his own material benefit, and received a relatively lengthy sentence of 51 months' imprisonment. Although the Applicant had applied for criminal rehabilitation in November 2018, that application did not appear to have been processed.

[17] With respect to H&C factors advanced in counsel's submissions, the officer acknowledged that the Applicant's family had provided documents indicating their support and referred to the family's financial obligations and the Applicant's wife's inability to work due to her injury. However, the officer was not satisfied that removal would separate the Applicant's family permanently or that the Applicant would be unable to continue to provide some level of support to his family following his return to India. The officer also noted the Applicant's spouse

and children previously lived with his sister, and received financial support from her, while he was incarcerated in the United States. The officer found it reasonable to conclude that support would be available from family members, the community, and Canadian health and social services and that, upon returning to India, the Applicant could rely on his Canadian work experience to find employment and could obtain support from his brother. The officer was not persuaded these H&C factors outweighed the seriousness of the applicant's involvement in the offence for which he was convicted and therefore recommended the case be referred to an admissibility hearing.

[18] The Minister's delegate concurred with this recommendation. The delegate acknowledged the H&C factors set out in the Applicant's submissions but, referring to the negative societal effects of trafficking in cocaine, concluded these H&C factors were not sufficient to offset the serious criminal conviction.

IV. **Issues and Standard of Review**

[19] The Applicant raises the following issues for the Court's consideration:

A. Does the CBSA's delay and timing in preparing the section 44 report constitute an abuse of process? In addition, should proceedings against the Applicant be stayed?

B. Did the CBSA err in failing to assess relevant rehabilitation factors required for a referral to the Immigration Division?

C. Did the CBSA ignore evidence in failing to meaningfully assess whether the Applicant's removal to India would be in the best interests of his children?

[20] The second and third issues, related to the merits of the Decision, are reviewable on a standard of reasonableness (see *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 at para 15). The parties did not make detailed submissions on the standard of review applicable to the first issue, alleging an abuse of process. As the Applicant frames this issue, at least in his submissions to CBSA, as one of procedural fairness, arguably the standard of correctness applies. Absent detailed submissions, I decline to make a definitive decision on this point as, even applying the more exacting standard of correctness, my conclusion is that there has been no abuse of process.

V. **Analysis**

A. ***Does the CBSA's delay and timing in preparing the section 44 report constitute an abuse of process? In addition, should proceedings against the Applicant be stayed?***

[21] The Applicant refers the Court to principles described in *Fabbiano v Canada (Citizenship and Immigration)*, 2014 FC 1219 [*Fabbiano*], to the effect that courts can stop proceedings that have become unfair or oppressive, including in situations where there has been an unacceptable delay resulting in significant prejudice, or where a person carried on with his life reasonably believing that no further action would be taken against him. The Applicant argues it was an abuse of process for CBSA to delay its efforts to remove the Applicant from Canada based on serious criminality until after the Faster Removal Act had eliminated his right of appeal to the IAD on this ground. In advancing this argument, the Applicant relies in particular on the GCMS

notes predating his 2013 IAD hearing, reflecting the visa officer's conclusion that the Applicant was a person described by s 36(1)(b). The Applicant also emphasizes that he specifically sought to add that ground of inadmissibility to his IAD appeal and that CBSA opposed that effort.

[22] While the Respondent raises various arguments in response to the abuse of process allegation, in my view the determinative argument arises from the fact that the Applicant was not in Canada at the time he sought to raise the serious criminality issue in his IAD appeal. The Applicant's right to appeal the visa officer's residency determination arose under s 63(4) of IRPA, which entitles a permanent resident to appeal a decision made outside of Canada on the residency obligations under s 28. Section 63 also creates other rights of appeal to the IAD, including a permanent resident's right to appeal against a decision to make a removal order against them (see IRPA, ss 63(2) and (3) as in force at the time of the IAD hearing)). However, a removal order flows from the issuance of a report under s 44(1); and, as previously noted, such a report can be prepared only in relation to a permanent resident or foreign national who is in Canada.

[23] It is uncontested the Applicant was not in Canada at the time of his appeal to the IAD, in particular at the time that he sought to have serious criminality added as a ground in that appeal. He did not return to Canada until September 2014. The Respondent therefore submits that CBSA did not at any material time have the authority to issue a section 44 report in relation to his criminality, so as to invoke the IAD's jurisdiction to hear an appeal related to that ground. By the time the Applicant returned to Canada, the Faster Removals Act had come into force, eliminating the Applicant's right to appeal a removal order based on his particular criminality.

[24] At the hearing of this judicial review, the Applicant's counsel disputed the Respondent's position that there was no means under IRPA by which CBSA could have brought the issue of the Applicant's criminal inadmissibility before the IAD as a ground of appeal when the Applicant was not in Canada. However, he was not in a position to articulate his argument at the hearing. As I wanted to have the benefit of the parties' submissions on the operation of the relevant provisions of IRPA, I afforded both parties a period of time to file post-hearing written submissions on this issue.

[25] In his subsequent submissions on this point, the Applicant does not identify a mechanism under IRPA by which the Applicant's criminal inadmissibility could have been brought before the IAD as a ground of appeal. Rather, he relies on the fact that CBSA did prepare a s 44 report, related to the Applicant's criminal inadmissibility, in October 2013. The Applicant argues therefrom that the Respondent was clearly of the view that a report could be prepared at that time. He also notes the Respondent did not take the positon before the IAD that it was premature to hear the matter of the Applicant's criminality because the Applicant was not in Canada. The Applicant submits the Court must distinguish between what the law allows and the Respondent's perception of the law. He takes the position that the Respondent deliberately sat on the preparation of a s 44 report until after the appeal right had been eliminated by the legislative amendment, representing an abuse of process.

[26] I find little merit to this submission. I accept for purposes of the Applicant's argument that, when the Respondent prepared the October 2013 report, it may have mistakenly believed either that it had the statutory authority to do so or that the Applicant was in Canada. However,

this belief was incorrect; and, the Applicant has suggested no other means through which CBSA could have brought the criminality issue to the IAD before the legislation changed, as the Applicant was outside Canada until after that change. The Applicant's abuse of process argument is based on the submission that it was unfair or oppressive for the Respondent to have waited to raise his criminality until after the amendment had eliminated his right of appeal. The Court cannot conclude that the Respondent's approach was unfair or oppressive, nor that the delay prejudiced the Applicant as required by the principles described in *Fabbiano*, when the Respondent had no ability to issue the report until after the Applicant returned to Canada in September 2014, by which time the legislation had changed.

[27] The Applicant's written submissions also refer to the Respondent delaying its efforts to remove him until 2018. At the hearing of this application, I understood the Applicant's counsel to acknowledge that he did not have a strong argument that the requisite prejudice occurred as a result of the period of time that had passed, as opposed to resulting from the change in the legislation during that period. However, for the sake of completeness, I note that I agree with the Respondent's position that the length of the time involved in this case (being at most from September 2014, when the Applicant returned to Canada, to October 2018 when the second s 44(1) report was written) does not meet the high threshold to establish an abuse of process contemplated by the authorities upon which the parties rely.

B. ***Did the CBSA err in failing to assess relevant rehabilitation factors required for a referral to the Immigration Division?***

[28] The Applicant argues that the Decision is unreasonable, because the CBSA failed to assess his potential for rehabilitation. He notes that departmental guidelines entitled "ENF6 -

Review of reports under subsection A44(1)" refer to the factors that should be considered in assessing a permanent resident's potential for rehabilitation. These factors include how much time has passed since the last conviction; whether the permanent resident has been released and, if so, for how long; whether the permanent resident has accepted culpability, expressed remorse, enrolled in or completed educational, skills upgrading or rehabilitation programs; and whether family members are willing and able to provide support. The Applicant also relies on *McAlpin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 422 [*McAlpin*], in which the Court held that it was reasonable for the CBSA to have placed significant weight on factors including the applicant's potential for rehabilitation.

[29] The Applicant submits the Decision focuses solely on the seriousness of his offense and the length of the sentence and does not meaningfully assess his potential for rehabilitation. He argues the Decision does not refer to the nine-year period since the conviction, his release from detention in 2011, his acceptance of culpability and expression of remorse, or the support of his family.

[30] Consistent with *McAlpin*, I agree the potential for rehabilitation was a relevant factor to be taken into account. However, I cannot conclude the Decision's treatment of that factor was unreasonable.

[31] In reviewing H&C factors and other information, the reviewing officer refers to the documentation submitted by members of his family confirming their support. The officer notes the Applicant's recognition of the terrible choice to commit his offense, the devastating

consequences this choice has had upon his family, and the significant damage he could have caused others. The officer also refers to the Applicant's efforts to better himself while in prison through GED courses and notes he signed up for Alcoholics Anonymous, although it was not clear whether he participated in such counselling. The Minister's delegate then expressly states that the Applicant's H&C submissions are extensive and compelling, including letters of support, ongoing efforts to reintegrate into Canadian society, and the fact that he has but one conviction for which he has served his sentence. However, the delegate concluded these factors were outweighed by the seriousness of his criminal conviction.

[32] I accept that there is no express reference to the nine-year period since the conviction or to the time that has passed since the Applicant's release from detention in 2011. However, it is evident from the Decision's recitation of the relevant events that the CBSA was aware of these dates. In my view, the analysis in the Decision demonstrates sufficient attention to the factors relevant to the Applicant's potential for rehabilitation—it cannot be said these factors were overlooked or that the Decision falls outside the range of acceptable outcomes which informs the reasonableness standard of review.

C. ***Did the CBSA ignore evidence in failing to meaningfully assess whether the Applicant's removal to India would be in the best interests of his children?***

[33] The Applicant acknowledges some divergence in Federal Court jurisprudence as to the scope of the discretion that Ministerial delegates have in deciding whether to refer an individual for admissibility hearing under s 44(2) of IRPA, in particular as to whether there is an obligation to take into account H&C factors when exercising this discretion (see *McAlpin* at para 56 *et seq*). However, the Applicant notes that the case law also acknowledges that a delegate who decides to

consider H&C factors must do so reasonably, regardless of whether they had obligation to consider such factors (see *Melendez v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1363 at para 34; *McAlpin* at para 70).

[34] I accept the Applicant's characterization of the state of the law. Indeed, the Respondent does not dispute this point, although it notes that a brief explanation of the role of H&C factors may be sufficient to withstand reasonableness review (see *McAlpin* at paras 70 and 78).

[35] Against that backdrop, the Applicant submits the Decision clearly engages with his H&C submissions and was therefore required to do so reasonably. He argues the Decision's treatment of those submissions was not reasonable, as it failed to engage in any meaningful way with the best interests of his children. The Applicant refers in particular to his submissions as to the poor educational and health care systems in India, his children's struggle to adapt to Indian culture during a previous attempt to live in India, and his older child's asthmatic condition, which was aggravated by the environmental conditions in that country. He therefore submits the option of relocation to India is not in his children's best interests. He also refers to a psychological report, speaking to the hardship the children had previously experienced in his absence, in support of his submission that it would not be in their best interests to be separated from their father.

[36] Applying the reasonableness standard, these arguments do not convince me the Decision is outside the range of acceptable outcomes. In considering the effect of the Applicant's removal upon his family including his children, the reporting officer appears to have adopted an analysis premised on the family remaining in Canada. This is consistent with the Applicant's 2018

submissions, explaining that it would not be in the children's best interest to relocate to India and identifying the financial hardship that his removal would cause, requiring them to return to the home of the Applicant's sister in Canada, as they had previously done when he was out of the country. It therefore cannot be concluded that the Decision overlooked the submissions on the negative effect that relocating to India would have upon the children.

[37] The Applicant's submissions also referred to the negative effect that separation from their father would have upon his children, including a reference to the psychological report prepared in 2013. The Decision does not expressly refer to this report. However, there is a rebuttable presumption that the decision-maker has considered all the evidence. The reporting officer refers to the Applicant's argument as to the profound emotional effects that his separation would have upon his family and, as previously noted, the Minister's delegate acknowledges the Applicant's H&C submissions to be compelling but does not find them to outweigh the seriousness of the criminal conviction. These facts do not support a conclusion that evidence or the Applicant's argument has been overlooked. Moreover, the delegate's reasons are comparable to those found in *McAlpin* to be sufficient to withstand reasonableness review. There is no basis to find the Decision unreasonable.

VI. **Proposed Certified Questions**

[38] The Applicant proposes two questions for certification for appeal:

A. What is the scope of the discretion of an immigration officer in determining whether to refer a permanent resident to an admissibility hearing?

B. If the Minister sits on the case, knowing that in doing so he/she will be depriving the appellant of a right of appeal, does this constitute an abuse of process?

[39] The Respondent opposes certification of both questions.

[40] In relation to the first question, the outcome of this application (in particular, the Applicant's third issue) turns not on the existence or scope of an officer's discretion, but rather on whether the exercise of such discretion was reasonable on the particular facts of this case. It is therefore not a question of general importance that would be dispositive of an appeal in this matter.

[41] The second question also would not be dispositive of an appeal, because the outcome of the Applicant's first issue does not turn on whether the circumstances described in the question constitute an abuse of process. Those circumstances do not arise in the present case, because the Respondent cannot be described as sitting on a case where it was without the statutory authority to act in the manner the Applicant would have preferred.

[42] I therefore find that neither question is appropriate for certification.

JUDGMENT IN IMM-1043-19

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

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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