

Federal Court



Cour fédérale

Date: 20220228

**Dockets: IMM-4363-21
IMM-4364-21**

Citation: 2022 FC 282

Ottawa, Ontario, February 28, 2022

PRESENT: Madam Justice Simpson

Docket: IMM-4363-21

BETWEEN:

SAMTRA SAMTRA

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

Docket: IMM-4364-21

AND BETWEEN:

SAMTRA SAMTRA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This decision deals with two applications for judicial review. The first application is in file IMM-4363-21. It relates to a decision of June 2, 2021 [the Decision] in which a CBSA officer [the Officer] decided to proceed with an admissibility hearing. This meant that the Officer was not prepared to reconsider his s 44(1) report in light of the H&C submissions provided by the Applicant's counsel. The second application is in file IMM-4364-21. It relates to a deportation order made against the Applicant by the Immigration Division on June 14, 2021 [the Deportation Order].

I. Background

[2] Mr. Samtra [the Applicant] is of Karen ethnicity. Karen people are persecuted in Myanmar. For this reason, the Applicant was born in a refugee camp in Thailand. When he was 10 years old, he came to Canada with his family who were accorded convention refugee status. He is a permanent resident of Canada.

[3] On May 4, 2019, when he was 19 years old, the Applicant was travelling in a motor vehicle with a friend in Winnipeg, Manitoba. They were on their way to a restaurant when another driver cut them off and followed them into the restaurant's parking lot. While the Applicant was seated in the car with his window down, one of the occupants of the other vehicle, who was a bigger, older man, walked up to the car and punched the Applicant in the face through the open window.

[4] The Applicant then pulled a gun and shot the man who had punched him, striking him in his chest. The victim was badly injured but not killed. The Applicant fled the scene and was later apprehended.

[5] The Applicant pled guilty and was convicted of recklessly discharging a firearm under s. 244.2(1) of the *Criminal Code of Canada*. Other charges related to the incident were stayed. He was given the minimum sentence of 4 years in prison. He had been in custody for 585 days by the time he was sentenced and he received credit for that time.

[6] In his Reasons for Sentence, Judge C. Devine noted that:

1. Shooting the Victim was a defensive response that was extremely disproportionate to the assault;
2. However, the Applicant was serving as a trustee in jail and had become a peaceful and responsible young adult who did not pose a risk to society; and
3. He was giving the Applicant the minimum sentence as a result of a joint recommendation by counsel;
4. Judge Devine added:

So although it was an extreme response, I understand where it came from. You're younger. You're smaller. You're trapped. And

you have a background where you had been assaulted or threatened with a gun even only the week before. You grew up in circumstances which were extremely difficult for you and your family in a refugee camp in Thailand. You witnessed beatings. You witnessed violence against kids and against other people. I take that into account.

But I also know that you have an extremely positive pro-social family and background where your parents worked hard. You have four little brothers and sisters. You have always gone to school. You have always worked or tried to be working. You are involved with the church. The pastor has your back. And so the prospects for your future in this country are quite good.

[7] On January 13, 2021, the Applicant was interviewed by the Officer on the telephone. The Applicant was informed that he was the subject of a pending s. 44(1) report and he was also served with a letter stating that he would have an opportunity to make written submissions.

[8] On January 15, 2021, the Applicant prepared a handwritten single-page letter of submissions [the Applicant's Handwritten Submissions]. Therein, he advised the Officer:

- a) That he was trying to finish his GED [grade 12] in prison, though he was having trouble;
- b) That he had worked since he was 15;

- c) That he had employment after his release from prison;
- d) That he had no gang involvement;
- e) That he had never been in trouble before;
- f) That he knew what he had done was wrong and that he had made a mistake;
- g) That he planned to be law-biding and do better so he could set an example for his younger brothers and sisters; and
- h) That he planned to help his parents pay their rent and buy food.

[9] On February 17, 2021, the Applicant was provided with a disclosure package and was given 10 business days to make further written submissions. However, he made no further submissions.

[10] On March 18, 2021, the Officer prepared a report under sub-section 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Report] and an A44 narrative report [the Narrative]. On the same day a Minister's Delegate referred the Report to the Immigration Division [ID] for an admissibility hearing.

[11] On May 6, 2021, through Legal Aid, the Applicant retained counsel [Counsel]. Counsel sent written submissions to the Officer on May 31, 2021. They set out humanitarian and compassionate [H&C] factors [Counsel's H&C Submissions]. Therein Counsel asked the Officer to reconsider the Report, withdraw it, and issue a letter of warning instead of a fresh report. He also asked that the pending admissibility hearing be cancelled.

[12] Counsel's H&C Submissions included two documents which the Officer had not seen before he wrote the Report and the Narrative. They had been prepared in connection with the Applicant's criminal proceeding. They were a psychosocial assessment, which concluded that the Applicant had undiagnosed ADHD and PTSD, and a pre-sentence report.

[13] Counsel's H&C Submissions also provided new information about the Applicant's background and family, commented on the circumstances of his conviction and sentencing, spoke of his active membership in his church, proposed a post-release treatment plan, and provided information about the Applicant's experiences in the refugee camp and about the current situation in Myanmar. In my view, the majority of Counsel's H&C Submissions constituted new evidence.

[14] Counsel asked that his H&C Submissions be considered because the Applicant had not had an opportunity to make submissions. It appears that Counsel was not aware of the Applicant's Handwritten Submissions of January 15, 2021.

[15] In an email dated June 2, 2021, the Officer replied to Counsel stating that he would not be considering his H&C Submissions because the Applicant had already had two opportunities to make submissions. In this regard, he enclosed a copy of the Applicant's Handwritten Submissions. The email also says that the admissibility hearing would proceed. It is clear that the Officer based his exercise of discretion about whether to reconsider the Report only on the fact that the Applicant had been given two opportunities to make submissions.

[16] Counsel replied to the Officer on the same day. Although Counsel had now seen the Applicant's Handwritten Submissions, he advised the Officer that his client was too unsophisticated to have been capable of making proper submissions because he had ADHD and PTSD and had not finished high school.

[17] At the admissibility hearing, which was held on June 14, 2021, the Member of the Immigration Division refused Counsel's request to adjourn the hearing to permit the Officer to consider Counsel's H&C Submissions. Instead, the Member made the Deportation Order.

II. The Issues

1. In exercising his discretion about whether to reconsider the Report, was the Officer required to consider Counsel's H&C Submissions?
2. In exercising his discretion, was the Officer also required to consider whether the Applicant was a vulnerable person?
3. Should the Deportation Order be set aside?

4. Should the question proposed by the Applicant be certified for appeal?
5. Should the Applicant have an extension of time to file his application in file IMM-4363-21?

III. Discussion

Issue 1

[18] The parties agree that the Officer in this case had discretion to reconsider the Report. The question is whether he exercised his discretion reasonably when he refused to consider Counsel's H&C Submissions.

[19] The decision of the Federal Court of Appeal in *Kurukkal v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ No 1159 was relied on by both parties. The case concerned an H&C application which an officer refused because the applicant had failed to provide his wife's death certificate. The certificate, which was described as the new evidence, arrived the day after the H&C application was refused. However, the officer declined to reconsider his decision on the basis that he had no power to do so because he was *functus officio*.

[20] The judgment of Madam Justice Mactavish [then of the Federal Court and now of the Federal Court of Appeal] focussed on whether the doctrine of *functus officio* applied to a non-adjudicative decision. She held that it did not. She therefore ordered that the H&C decision be reconsidered on its merits and that the new evidence be weighed in that process [the Order].

[21] On appeal, the Federal Court of Appeal upheld Justice Mactavish in part, finding that the doctrine of *functus officio* did not prohibit the officer from reconsidering the H&C application.

At paragraph 5 of its decision, the Court of Appeal turned to the Order and said:

[5] The judge directed the immigration officer to consider the new evidence and to decide what, if any, weight should be attributed to it. In our view, that direction was improper. While the judge correctly concluded that the principle of *functus officio* does not bar a reconsideration of the negative section 25 determination, the immigration officer's obligation, at this stage, is to consider, (taking into account all relevant circumstances), whether to exercise the discretion to reconsider.

(my emphasis)

[22] In my view, in this passage, the Court was not saying that it was improper to consider the new evidence when exercising discretion about whether to reconsider. Rather, the Court was saying that the Order was improper because it directed the officer to decide the merits of the H&C application when it should have directed him to undertake a fresh exercise of his discretion about whether to reconsider the negative H&C decision.

[23] In other words, the Court of Appeal did not, as the Respondent submits, say that new evidence is not to be considered when discretion about whether to reconsider is being exercised. Instead, it required that all relevant circumstances be considered.

[24] Accordingly, in my view, the exercise of discretion about whether to reconsider must involve a full assessment of any new evidence, including its source, its credibility, and its relevance. It was therefore unreasonable of the Officer in this case to refuse to reconsider the Report without considering Counsel's H&C Submissions.

Issue 2

[25] Applicant's Counsel submitted that the Applicant was a vulnerable person and that this fact should have been considered by the Officer in the exercise of his discretion about whether to reconsider the Report. The submission was that vulnerability should have been treated as if the matter had been before the Immigration and Refugee Board.

[26] In my view, there was no reason why the Officer should have considered the Applicant to be vulnerable. The ADHD and PTSD mentioned in the psycho-social assessment were undiagnosed. However, he was unfamiliar with the range of matters that could have been advanced as H&C considerations. This was a relevant fact and the Officer should have considered it when exercising his discretion about whether to reconsider the Report.

Issue 3

[27] An order will be made requiring another officer to exercise his or her discretion about whether to reconsider the Report. If a decision is made to reconsider the Report, and if, on that reconsideration, a decision is made to withdraw the Report, then the Deportation Order will be of

no force and effect. However, for the moment it remains valid. For this reason, the application for judicial review of the Deportation Order will be dismissed.

Issue 4

[28] The Applicant proposed a question for certification. However, in view of the judgment in file IMM-4363-21 in the Applicant's favour, the question need not be addressed.

Issue 5

[29] The extension of time was not opposed by the Respondent. The delay was brief and explained. In these circumstances, the extension will be granted to June 29, 2021.

IV. Conclusions

[30] The application for judicial review of the Deportation Order will be dismissed.

[31] The application for judicial review of the Decision will be allowed and another officer is to consider whether in his or her discretion, taking all the relevant circumstances into account, the Report should be reconsidered.

[32] The officer conducting the reconsideration is to include in his or her assessment of all the relevant circumstances, whether the Narrative fairly addressed the H&C Factors of which the Officer was aware. This would include asking:

1. Whether it was fair to note in the Narrative that the Applicant did not express remorse in his phone interview and fail to mention that he did so three days later in his Applicant's Handwritten Submissions when he said that he knew that what he had done was wrong and that he wanted to do better;
2. Whether it was to fair to omit reference in the Narrative to the Applicant's attachment to his church and his pastor's support which is described in the Judge's Reasons for Sentence;
3. Whether it was fair to omit reference in the Narrative to his future employment prospects;
4. Whether it was fair to omit reference in the Narrative to the fact that the Applicant received the minimum sentence with the agreement of both counsel; and
5. Whether it was fair to omit reference in the Narrative to that the fact that the Applicant had been made a trustee in prison.

JUDGMENT IN IMM-4363-21

THIS COURT'S JUDGMENT is that this application is granted and the Decision is set aside. Another officer is to exercise discretion about whether to reconsider the Report in light of these reasons. Further, the time for filing this application is hereby extended to June 29, 2021.

JUDGMENT IN IMM-4364-21

THIS COURT'S JUDGMENT is that this application is dismissed.

"Sandra Simpson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4363-21

STYLE OF CAUSE: SAMTRA SAMTRA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

AND DOCKET: IMM-4364-21

STYLE OF CAUSE: SAMTRA SAMTRA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEOCONFERENCE USING ZOOM

DATE OF HEARING: JANUARY 13, 2022

JUDGMENT AND REASONS: SIMPSON J.

DATED: FEBRUARY 28, 2022

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