

Federal Court



Cour fédérale

Date: 20241002

Docket: IMM-6817-23

Citation: 2024 FC 1532

Ottawa, Ontario, October 2, 2024

PRESENT: Madam Justice St-Louis

BETWEEN:

ILIR SHEHU

Applicant

and

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

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Mr. Ilir Shehu, the Applicant, seeks judicial review of the decision an Inland Enforcement Supervisor of the Canada Border Service Agency [Minister's Delegate] rendered on April 20, 2023, under subsection 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act]. The Minister's Delegate found that the December 1, 2020 report prepared under subsection 44(1) of the Act [the 44(1) Report] was well founded and referred said report to

the Immigration Division [ID] for an admissibility hearing to determine if Mr. Shehu is a person described in paragraph 36(1)(b) of the Act.

[2] Before the Court, in support of his application for judicial review, Mr. Shehu argues that the Minister's Delegate:

- 1) Failed to meet the requirements of procedural fairness by refusing to disclose the documents he relied upon to render his decision to refer the 44(1) Report for an admissibility hearing, namely documents numbers 6 and 7 of the "List of Disclosure Documents Submitted for Admissibility Hearing", thus violating Mr. Shehu's right to meaningful participation and to know the full case made against him; and
- 2) Erred by ignoring all of Mr. Shehu's circumstances and written submissions when rendering his decision that the 44(1) Report was well founded and should be referred to the ID for an admissibility hearing.

[3] The Attorney General of Canada [AGC] responds that (1) procedural fairness was not breached as Mr. Shehu's suggestion that he did not receive full disclosure is unsupported by the evidence; and (2) the Minister's Delegate's decision to refer the 44(1) Report is reasonable.

[4] Both parties agree that the application for judicial review is not premature.

[5] In brief, given the particular circumstances of this case, I agree with the parties and find the application for judicial review is not premature and further find that procedural fairness was

fatally breached. I will thus grant the application for judicial review and return the case to a different minister's delegate for a new determination, taking these reasons into consideration.

II. Analysis

A. *The application for judicial review is not premature.*

[6] Prior to the hearing of this application, I raised the issue of its possible prematurity in light of the exhaustion doctrine and the Federal Court of Appeal's decision in *Lin v Canada (Public Safety and Emergency Preparedness)*, 2021 FCA 81 [*Lin*]. The parties were kind enough to address the issue and file additional written submissions. They agreed that the present application is not premature.

[7] Given the particular circumstances of this case, I agree with the parties that the application is not premature. Particularly, I adopt the reasoning of my colleague Mr. Justice Michael Manson in *XY v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 831 [*XY*] and find that the facts in *Lin* are distinguishable from the facts of this case. More specifically, I note that (1) Mr. Shehu is a permanent resident of Canada; (2) Mr. Shehu has raised human and compassionate [H&C] considerations before the Minister's Delegate; (3) the ID cannot entertain the H&C considerations; (4) per the AGC's confirmation, Mr. Shehu will have no appeal before the Immigration Appeal Division where H&C considerations could be entertained (paragraph 67(1)(c) of the Act); and (5) Mr. Shehu therefore does not have an adequate alternative remedy in the form of an admissibility hearing before the ID.

B. *Breach of procedural fairness*

(1) Parties' positions

[8] First, Mr. Shehu submits that his right to procedural fairness was violated by the Canada Border Service Agency [CBSA] officers who handled the redetermination of his case because they did not respect their obligation to disclose the documents where the information sought was material and otherwise unknown and unavailable. Mr. Shehu adds that the CBSA voluntarily withheld documents which hindered his ability to address the material facts concerning the admissibility allegations and also to substantiate his claim of leniency. Mr. Shehu argues that in doing so, the CBSA officers breached his right to meaningful participation, which included the right to know the case to be met and to fully and fairly present his defence to the decision maker. More specifically, Mr. Shehu asserts that the Minister's Delegate failed to disclose documents that correspond to numbers 6 and 7 of the "List of Disclosure Documents Submitted for Admissibility Hearing" which are respectively the Albanian decision dated 07 July 2017 and its translation in November 2020 by the Translation Bureau of the Government of Canada. Second, Mr. Shehu argues that a second breach of procedural fairness occurred as he was given false and misleading information concerning which documents the Minister's Delegate would be relying on to render his decision.

[9] The AGC responds that the Minister's Delegate relied on a statutory declaration and disclosed all evidence relevant to the 44(1) Report. The AGC adds that even if a Hearings Officer later provided a list of documents for the admissibility hearing before the ID which includes the Albanian decision, this process is separate and this document, i.e., the Albanian decision, was not before the Minister's Delegate. The AGC argues that further disclosure

obligation arises only after the Minister's Delegate refers the matter to the ID. In this case, the AGC asserts the letter dated May 5, 2023, sent by the Hearings Officer after the Minister's Delegate referred Mr. Shehu's case to the ID may include new documents such as the Albanian court decision. However, there is no indication that this court document was before the Minister's Delegate as this letter refers to a list of documents disclosed to the ID, not document before the Minister's Delegate.

(2) Standard of review

[10] As Justice Manson outlined in *XY*, the “[j]urisprudence of this Court has established that an applicant is entitled to disclosure in the course of the section 44 process under the Act, ‘where the information sought is material and otherwise unknown and unavailable’” (*XY* at para 92, citing *Durkin v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 174 at para 14). More generally, the Federal Court of Appeal has highlighted that an applicant has a right to know the case to be met, and to have a full and fair chance to respond to it (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 56 [*Canadian Pacific*]).

[11] Though no standard of review is applied on a question of procedural fairness, the reviewing exercise is “best reflected in the correctness standard” (*Canadian Pacific* at para 54).

(3) Evidence in the record

[12] Considering Mr. Shehu's arguments, it is useful to outline a close examination of the record. This examination reveals that:

- On December 1, 2020, an enforcement officer reported under subsection 44(1) of the Act that in his opinion, Mr. Shehu, a permanent resident, is inadmissible in Canada pursuant to paragraph 36(1)(b) of the Act (the previously defined 44(1) Report);
- In May 2021, Mr. Shehu responded to the CBSA's invitation to provide submissions and, through counsel, submitted written submissions stating Mr. Shehu had never been implicated in a criminal act in his country of birth, putting forth H&C factors and arguing that he should be allowed to remain in Canada and continue with the life he has built for himself. He also included a document purporting to be a police clearance certificate from Albania dated 2018 attesting of his absence of criminal record and a document in Albanian dated 04/04/2018, amongst other documents;
- On July 6, 2022, an inland enforcement officer from the CBSA, acting as a reporting officer [Reporting Officer], prepared case review notes and the recommendation as to whether a referral to an admissibility hearing was warranted. Ultimately, the Reporting Officer did not feel that the H&C factors raised by Mr. Shehu were such that they outweighed the seriousness of the convictions against Mr. Shehu and he recommended that Mr. Shehu be referred to an admissibility hearing before the ID;
- Importantly, in his case review notes, the Reporting Officer referred to "documents on file" as issued by the Office of Judicial Status of the General Directorate of Prisons of Albania, which indicated that the Judicial District Court of Elbasan declared Mr. Shehu guilty and sentenced him to 5 years in prison;

- On July 8, 2022, a first minister's delegate found the 44(1) Report well founded and, pursuant to subsection 44(2) of the Act, referred it to the ID for an admissibility hearing;
- Mr. Shehu challenged this referral before the Federal Court. The AGC agreed to settle the matter and the case was sent back for a new determination by another Minister's delegate;
- On January 24, 2023, the same Reporting Officer contacted counsel for Mr. Shehu and requested that Mr. Shehu apply for Attestation for Verification of Judicial Status, as instructed by the Albanian Embassy. Between February and April 2023, the Reporting Officer and counsel for Mr. Shehu exchanged messages, requests and submissions. First, in an email sent on February 13, 2023, counsel for Mr. Shehu stressed that full disclosure of all the evidence against Mr. Shehu was requested in order to respect his procedural fairness rights, namely that he understood the case against him. Counsel for Mr. Shehu highlighted that, since his client was not part of the criminal proceedings and did not have knowledge of the facts relied on by the CBSA to form their opinion, the duty of procedural fairness required sufficient disclosure from the CBSA to address concerns related to the substance of the inadmissibility allegations. He stressed that the information sought by his client was material to the redaction of both reports 44, and was otherwise unknown and unavailable to him. Mr. Shehu's counsel concluded that his client may choose to submit evidence supporting or challenging the CBSA's allegations following receipt its full disclosure;

- On February 17, 2023, the Reporting Officer confirmed there was nothing to disclose and repeated his request for Mr. Shehu to obtain a criminal check record from the Albanian Embassy. There is no indication Mr. Shehu provided the requested document;
- On February 22, 2023, Mr. Shehu's counsel specifically expressed concern about the fact there were no documents to disclose from the CBSA and conveyed wonder about the source of information that Mr. Shehu had criminality in Albania;
- On March 21, 2023, a CBSA Liaison Officer in Rome [Liaison Officer] signed a statutory declaration indicating he had received confirmation that Mr. Shehu was wanted in Albania for prison sentencing based on a decision made by the District Court of Elbasan on 07 July, 2017 for the criminal offence of Production and Sale of Narcotic Substances, foreseen by article 283 of the Albanian criminal code. The Liaison Officer provided no details of the events leading to the conviction and sentencing. The Liaison Officer also stated that he presented the two documents submitted by Mr. Shehu to the Head of Liaison Officers Section – Albanian State Police and he received confirmation that these documents were not valid;
- On March 28, 2023, the Reporting Officer (1) informed Mr. Shehu's counsel that the Minister's Delegate would be relying on evidence presented in the case file up until the referral to an admissibility hearing in July 2022; (2) indicated that the material had previously been disclosed to him and his client; and (3) that the new evidence consisted of the Liaison Officer's statutory declaration, which was enclosed within the

Reporting Officer's email. The Reporting Officer invited Mr. Shehu and his counsel to make any additional submissions;

- On April 17, 2023, counsel for Mr. Shehu sent written submissions reiterating his request for disclosure of all evidence, reiterating that Mr. Shehu had not been implicated in criminality in Albania, recalling the H&C factors submitted in 2021 and ultimately asking not to recommend a deferral to the ID;
- On April 19, 2023, the Reporting Officer prepared notes to file and maintained his 2022 recommendation of a referral for an admissibility hearing. The Reporting Officer outlined the chronology of events, communications and verifications starting in January 2023. He stated that Mr. Shehu's counsel was provided disclosure with all evidence pertaining to the section 44 reports and that no new compelling evidence was presented. Accordingly the initial recommendation of referral to an admissibility hearing dated July 7, 2022 remained unchanged;
- On April 20, 2023, the Minister's Delegate confirmed having reviewed this case in its entirety and concurred with the Reporting Officer's assessment to refer the case for an admissibility hearing. The Minister's Delegate indicated having considered all the evidence and found the H&C factors did not outweigh the aggravating factors. The Minister's Delegate also acknowledged Mr. Shehu would not benefit from an appeal before the Immigration Appeal Division should the ID issue a deportation order; and
- On May 5, 2023, a Hearings Officer sent a letter to Mr. Shehu and his counsel to provide him with a list of material provided to the ID. This list included the Albanian court document and its translation.

[13] It is unclear if the “documents on file as issued by the Office of Judicial Status of the General Directorate of Prisons of Albania” referred to by the Reporting Officer in his July 6, 2022 case review notes correspond to the Albanian decision and its translation as mentioned above. Nonetheless, in his notes, the Reporting Officer uses the same language found in this translation, namely the facts provided therein as well as the relevant articles from the Albanian Penal Code and Code for the Penal Procedure (e.g., Article 283/2 of the Penal Code and Article 406 of the Code of the Penal Procedures). Hence, it appears the “documents on file” were either the same documents that corresponds to numbers 6 and 7 of the “List of Disclosure Documents Submitted for Admissibility Hearing” or they were other documents that contain the same information provided in these documents numbered 6 and 7.

[14] The evidence thus reveals that:

- 1) The Reporting Officer probably had access either to the Albanian court document and its translation themselves or to other documents that contained the same information therein;
- 2) In any case, the Reporting Officer considered this information as part of his recommendation leading to the first referral decision in July 2022;
- 3) Mr. Shehu’s counsel unequivocally asked for full disclosure;
- 4) The Reporting Officer confirmed all the evidence already in the file along with the new statutory declaration would be considered by the Minister’s Delegate;

- 5) The Reporting Officer did not disclose the Albanian court document or its translation nor any other document which contained the information provided therein to Mr. Shehu; and
- 6) The Reporting Officer confirmed to Mr. Shehu's counsel that there was nothing to disclose.

[15] Based on the record, I am satisfied that the material documents, i.e., either the Albanian court document and its translation or another document that contained the same information therein, were before the Minister's Delegate. Additionally, it is clear that Mr. Shehu was entitled to this disclosure (see *XY*) and did not receive full disclosure as required.

[16] The AGC has not provided any indication that the information is, or was available or public, and we have no indication on how the CBSA acquired it back in 2020.

[17] The AGC asserts that the Minister's Delegate did not have the documents in question. However, the evidence on record tends to show the documents were indeed in the file, were considered and were not disclosed to Mr. Shehu.

III. Conclusion

[18] Based on the relevant case law, and in the particular circumstances of this case, I am satisfied that the CBSA fatally breached the principles of procedural fairness by not disclosing to Mr. Shehu the Albanian Court document and its translation or any other document that contained

the same information therein. I will thus set aside the Minister's Delegate's decision of April 20, 2023 and send it back for a new determination taking these reasons into consideration.

[19] Considering my findings above, there is no need to address Mr. Shehu's second argument. It is also not appropriate to certify a question.

JUDGMENT in IMM-6817-23

THIS COURT'S JUDGMENT is that:

1. The Applicant's application is allowed.
2. The Minister's Delegate's decision of April 20, 2023 is set aside and the matter is referred back for a new determination by another minister's delegate taking these reasons into consideration.
3. No question is certified.
4. No costs are awarded.

"Martine St-Louis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6817-23

STYLE OF CAUSE: ILIR SHEHU V THE MINISTER OF PUBLIC SAFETY
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