Federal Court		Cour fédérale

Date: 20100908

Docket: IMM-4042-09

Citation: 2010 FC 882

Ottawa, Ontario, September 8, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

GORDON DOUGLAS ROSENBERRY
and MURIEL HARDWICK ROSENBERRY

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application for judicial review of the decision of the Minister's delegate dated July 31, 2009, wherein the Minister's delegate issued a removal order against each of the applicants

pursuant to Section 44 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) due to the applicants' violations of subsections 41(a) and 29(2) of the Act.

[2] The applicants also raise the question of whether the procedure laid out in section 44 of the Act violates the constitutional principle of the separation of powers.

[3] The applicants seek an order setting aside the decision.

Background

[4] The applicants are citizens of the United States whose daughter, Janice Howie, is a permanent resident of Canada living in Edmonton, Alberta. In January of 2008, Ms. Howie sponsored the applicants' immigration to Canada as members of the family class. Before the applicants had obtained a decision, they chose to come to Canada. To that end, the applicants sold their house in California and sent their belongings to Ms. Howie's residence.

[5] The applicants allege that at the time, they believed it was not a violation of Canadian law to await the results of their application in Canada. However, they were turned back at the Idaho Canada border because they failed to satisfy the officer that they were entering Canada for a temporary purpose. The applicants believe that they were also denied entry because the applicant, Muriel Rosenberry, displayed symptoms of Alzheimer's disease.

[6] In June of 2008, the applicants entered Canada at a different border crossing and without proper authorization. They flew to Edmonton where they had purchased a home prior to entering.

[7] On November 17, 2008, the applicants applied for a visitor status extension. It was not until June 26, 2009, that Citizenship and Immigration Canada (CIC) at Edmonton finally contacted the applicants and requested an interview regarding their request to extend their stay. On July 3, 2009, counsel for the applicants wrote back explaining that he wished to attend the interview to make submissions on behalf of the applicants, but asked that the interview be postponed as he would be away on the day scheduled.

[8] Meanwhile, given that nothing happened for several months, the applicants examined other options. On July 4, 2009, the applicants submitted a second application for permanent residence, this one from within Canada and on humanitarian and compassionate (H&C) grounds under section 25 of the Act.

[9] CIC Edmonton informed applicants' counsel's office that the request to postpone was declined and on July 9, 2009, an immigration officer went ahead with the interview with another lawyer from counsel's firm present. The immigration officer denied the applicants' visitor extension and by a letter dated July 14, 2009, the applicants were directed to leave Canada forthwith. In the reasons for the decision, the officer examined the issue of hardship and noted the applicants' and Ms. Howie's admission that even though they had sold their house, the applicants could live with either of their sons in California.

[10] These reasons became the basis of inadmissibility reports under subsection 44(1) for the applicants. The allegation of inadmissibility was relatively straightforward: the applicants were foreign nationals who were inadmissible pursuant to subsections 41(a) and 29(2) of the Act in that they had failed to leave Canada at the end of the period authorized for their stay.

[11] On July 31, 2009, the applicants attended an admissibility hearing with the Minister's delegate. Applicants' counsel was also present and at the outset of the hearing, sought an adjournment until the H&C application had been processed. This request was denied. At the end of the hearing, the Minister's delegate issued removal orders for both applicants.

Issues

[12] The issues are as follows:

1. Does the procedure laid out in section 44 of the Act comply with section 7 of the *Charter*?

2. Did the Minister's delegate breach the duty of fairness owed to the applicants by failing to grant an adjournment?

Applicants' Written Submissions

Constitutional Question

[13] The procedure laid out in section 44 violates the principles of fundamental justice. A delegate of the Minister cannot review a report prepared by an officer from the same department to adjudicate whether or not the person referred to in that report should be removed. The same department is acting in both an executive and judicial capacity thus, violating the constitutional principle of the separation of powers. Therefore, all reports examined under subsection 44(2) must be sent to the Immigration Division. The section 44 proceedings differs from an officer turning someone back at a port of entry because in the former scenario, the visitor had already been granted permission to enter, and is therefore entitled to be treated differently.

Breach of Procedural Fairness

[14] The duty of fairness required the Minister's delegate to provide the applicants with an open procedure, with an opportunity to put forward their views and evidence fully and to have these considered by the decision maker. This duty was breached as the Minister's delegate blocked the applicants from making submissions and did not consider the evidence they submitted.

[15] The Minister's delegate objected to the request of the applicants' counsel to make the preliminary application to adjourn the proceedings. She reluctantly listened to the submission and then interrupted to seek proof of his authority to act for the applicants and ultimately did not give him a full opportunity to make his case. Counsel submitted a binder of materials in support of this application addressing:

- the inadequacy of the previous interview (the July 9 interview);
- the length of the requested adjournment (the processing times of the H&C application);
- medical evidence showing that although the applicant, Muriel Rosenberry was relatively healthy when she came across the border, she was now in an advanced state of Alzhiemer's, making her departure quite impractical;
- evidence of previous compliance with the Act;
- provisions of the Act, Regulations and policy manuals dealing with flexibility in allowing parents to visit Canada while awaiting processing of sponsorship applications;

The binder was not looked at by the Minister's delegate.

[16] The duty of fairness also included the right to counsel. The Minister's delegate's failure to consider these submissions violated that right.

Structural Breach of Procedural Fairness

[17] The concern referenced above regarding individuals from the same department acting in both the executive and judicial capacities, creates situation where there is a reasonable apprehension of bias. The individual who adjudicates the report is responsible to the same department as are those individuals who created the report and will execute the decision.

Respondent's Written Submissions

[18] Foreign nationals who are temporary residents in Canada receive little substantive and procedural protection throughout the Act. Immigration officers and delegates of the Minister under subsection 44(2) are often simply on a fact finding mission. They are under an obligation to act on facts indicating inadmissibility. The facts indicating inadmissibility in the present case were undisputed. It is not the function of such officers to consider H&C factors or risk factors that would be considered in a pre-removal risk assessment.

[19] There was no breach of procedural fairness. The applicants had the benefit of legal counsel at both their interview on July 9, 2009 and the hearing on July 31, 2009. The submission that they were denied the right to counsel is without merit.

[20] The Minister's delegate did not commit any reviewable error in making her decision. She confirmed with the applicants that the allegations contained in the report were substantiated by the facts and the evidence. She also ensured that the applicants understood the allegations and that a removal order would be made against them if the allegations were supported. She was not required to consider H&C or risk factors.

Analysis and Decision

[21] **Issue 1**

Does the procedure laid out in section 44 of the Act comply with section 7 of the *Charter*?

The applicants' submission cannot succeed. The applicants' prime concern seems to be that the case against the applicants was prepared by an officer from the same department as the Minister's delegate who adjudicated the matter. This, says the applicants, violates the principle of separation of powers. This argument is tantamount to suggesting that all, or at least many, administrative decisions must be made by a member of the judiciary or, at minimum, an independent quasi-judicial body within the administration.

[22] Clearly, the unwritten constitutional principle of rule of law cannot be put into effect without adequate separation of the executive, legislative and judicial functions and powers by government. This has not been interpreted to render *ultra vires* any provision authorizing the administrative branch of the executive to make a decision without the supervision of a member of the judiciary or a quasi-judicial body. I am not persuaded that there was a breach of section 7 of the *Charter*.

[23] Legislation may duly authorize administrative officers to make decisions concerning the rights and interests of individuals.

[24] In conclusion, I am of the view that the procedure laid out in section 44 does not violate the constitutional principle of separation of powers.

[25] The fulfillment of the duty of fairness requires that administrative decision makers appear to be unbiased (see *R. v. R.D.S.*, [1997] 3 S.C.R. 484). Administrative decision makers must also be independent (see *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, [1995] S.C.J.

No. 1 (QL), Brown, D. J. M., and J. M. Evans. *Judicial Review of Administrative Action in Canada*, 1998 (loose-leaf ed. updated September 2009), at paragraph 11.1110).

[26] The concepts of bias and lack of independence are related. The tribunal itself must satisfy the standard of institutional independence. Where the tribunal's relationship with the executive is authorized by the statute itself, this standard will be satisfied unless there is a violation of sections 7 or 11 of the Charter (see *Canadian Pacific Ltd.* above and *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 276 D.L.R. (4th) 594).

[27] Often regulatory administrative agencies such as CIC, are duly authorized to combine investigative, enforcement and adjudicative functions without being unlawfully biased. Indeed, Brown and Evans, above, at paragraph 11.3360, have explained why these multi-functional agencies often require such latitude in order to adequately fulfill their roles:

> In the administration of criminal justice, a clear distinction is observed between the investigation and prosecution of a matter by the police and Crown attorneys on the one hand, and the trial of a charge by a judge on the other. Specifically, a judge can have no prior knowledge of about a case as a result of having been involved at some earlier stage of the process. By way of contrast, it is by no means unusual for regulatory administrative agencies to combine the functions of law-makers, law-enforcers and adjudicators.[...]
>
> Accordingly, to mechanically impose the concept of bias as it has developed to reflect the adversarial structure of criminal justice onto multi-functional agencies may undermine the agency's ability to perform its regulatory functions effectively.

[28] Working in the same department has not been considered as a reason to find a lack of independence, especially in the context of a decision in which neither the officers involved nor the institution has any substantial interest.

[29] Where the party prosecuting the matter is found to have an interest in the outcome, either pecuniary or proprietary, or that party appoints or exerts control over the tribunal, the tribunal lacks institutional independence (see *Canadian Pacific Ltd.* above).

[30] In the immigration context and particularly in the section 44 process, while the officer preparing the report under subsection 44(1) may be analogized as the prosecuting party, it is not clear what interest in the outcome such an individual might have. Immigration officers and delegates of the Minister under subsection 44(2) are simply agents of a multi-functional regulatory agency, the relevant interest of which is to enforce Canadian immigration law, but with no general interest in the outcomes of individual cases. Certainly, there is no pecuniary or proprietary interest. Nor is there any indication that the officer has any say in appointing of the officer who adjudicates the report under subsection 44(2).

[31] Indeed, the bifurcated process under section 44 enhances procedural safeguards by ensuring that not one but two immigration officers must concur in the result before exclusion action is taken. The practice appears to be that the officer who executes the function under subsection 44(2) is senior to the officer who prepares the subsection 44(1) report. In my opinion, this also enhances the appearance that an independent conclusion is arrived at.

[32] As a result of the foregoing reasons, I am not satisfied that simply because the individual who adjudicates the report and those individuals who created the report work in the same department, that their decisions must be set aside for a lack of institutional independence.

[33] **Issue 2**

Did the Minister's delegate breach the duty of fairness owed to the applicants by failing to grant an adjournment?

This judicial review application stems not from the ultimate decision of the Minister's delegate finding the applicants inadmissible, but her refusal to adjourn the admissibility proceeding pending the outcome of the applicants' H&C application. The Minister's delegate refused the request without fully examining the applicants' submissions and the issue is whether that constituted a breach of the duty of fairness. For the reasons below, I find that there was no such breach.

[34] Administrative agencies are the masters of their own procedure and the power to adjourn proceedings is generally discretionary (see *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at paragraph 48). As such, while courts do not show any deference on matters of procedural fairness, decisions granting or refusing adjournments are recognized as discretionary in nature.

[35] In the present case, the duty of fairness did not require the granting of an adjournment. Adjournments may be requested in administrative hearings to allow an applicant a reasonable opportunity to present evidence and arguments to the decision maker. The substance of the request

for an adjournment in the present case had nothing to do with the matter at hand. Waiting until the H&C application had been processed would not have any effect on the issue being adjudicated, the applicants' current inadmissibility.

[36] The substance of the decision did not require the Minister's delegate to consider the H&C application or H&C factors at all. Under section 44 immigration officials are simply involved in fact-finding. They are under an obligation to act on facts indicating inadmissibility. It is not the function of such officers to consider H&C factors or risk factors that would be considered in a pre-removal risk assessment. This was recently confirmed in *Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 F.C.R. 409 at paragraphs 35 and 37.

[37] Nor was it necessary in the context of the admissibility decision or the request for an adjournment to consider issues relating to the practicability of removal. At the time the request was made, it would have been reasonable for the Minister's delegate to consider that in the event that removal orders were made against the applicants, the applicants would still be entitled to make a request under section 48 of the Act to stay their removal, at which point a pending H&C application and other factors relating the practicability of removal are often considered.

[38] The duty of fairness did require the Minister's delegate to listen to the primary reason for the request. It did not require her to allow the proceedings to grind to a halt and examine all of the applicants' material. While it appears that counsel for the applicants and the Minister's delegate were less than warm with each other, there is no indication that she misunderstood the reason for the

requested adjournment. Indeed, as it turned out, the request for the adjournment was the only submission made.

[39] When applicants' counsel initially made his request, he indicated that the basis of the request was for an adjournment pending the H&C application. He also verbally indicated the contents of a binder of documents in support of the request including information on the length of processing times and medical reports for Muriel Rosenberry. At this point, the Minister's delegate did question counsel's authority to represent the elderly applicants. Then the hearing continued in part:

> Q [Minister's Delegate]: Mr. Semotiuk I have considered your application for an adjournment and my decision is to proceed.
>
> CSL: You haven't considered all of my submissions. You owe us a duty of fairness to at least hear the submission before you make a decision. You may want to consider the Hernandez case. . . .
>
> Q: Thank you. As I understand your request, you have asked that this hearing be adjourned pending disposition of your client's application for permanent residence on humanitarian and compassionate grounds. When was the application submitted?
>
> CSL: It was submitted on July 4th.
>
> Q: Of which year?
>
> CSL: This year – 2009. I feel it would be helpful to you if I just made one more submission.
>
> Q: What would that be?
>
> CSL: Janice [sic] Howey and her husband are the only sources of support for these 80-year-old people in the world. Mr. [*sic*] Rosenberry is suffering from an advanced case of Alzheimer's and Mr. Rosenberry is looking after her along with his daughter and son-in-law to the best that they can. It would be cruel and unusual in these circumstances to remove these people from Canada without at least hearing their humanitarian and compassionate submissions.

> Q: Thank you. I have considered your request and my decision is to continue.

[40] Although the applicants argue that the Minister's delegate did not allow them to make their submissions, I find no evidence of this in the minutes. While the Minister's delegate dealt with the request swiftly and with a negative result for the applicants, there is no indication that she prevented them from making any important submission in favour of the adjournment.

[41] Indeed, in my view, the Minister's delegate handled the request correctly. The process is administrative in nature, with no requirement for the hallmarks of a quasi-judicial procedure. It was entirely appropriate for the Minister's delegate to consider that the entire submission and especially the last submission, to be more adequately and appropriately handled in a request under section 48 of the Act. As well, it would seem to me that the officer was presented with a summary of the binder materials.

[42] In my view, the applicants were afforded a fair procedure. The application for judicial review is therefore dismissed.

[43] The applicants' proposed the following serious question of general importance for my consideration for certification:

> Is section 44(2) of the IRPA *ultra vires* insofar as it provides that a foreign national who has been admitted to Canada as a temporary resident can be removed from Canada, not by a decision of the

> Immigration Division, but by a decision of an immigration officer alone?

I am not prepared to certify this question as the issue raised by this question has already been determined by the Courts.

JUDGMENT

[44] **IT IS ORDERED that:**

1. The application for judicial review is dismissed.

2. No question will be certified.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, S.C. 2001, c. 27

22.(1) A foreign national becomes a temporary resident if an officer is satisfied that the foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(b) and is not inadmissible.	22.(1) Devient résident temporaire l'étranger dont l'agent constate qu'il a demandé ce statut, s'est déchargé des obligations prévues à l'alinéa 20(1)b) et n'est pas interdit de territoire.
(2) An intention by a foreign national to become a permanent resident does not preclude them from becoming a temporary resident if the officer is satisfied that they will leave Canada by the end of the period authorized for their stay.	(2) L'intention qu'il a de s'établir au Canada n'empêche pas l'étranger de devenir résident temporaire sur preuve qu'il aura quitté le Canada à la fin de la période de séjour autorisée.
29.(1) A temporary resident is, subject to the other provisions of this Act, authorized to enter and remain in Canada on a temporary basis as a visitor or as a holder of a temporary resident permit.	29.(1) Le résident temporaire a, sous réserve des autres dispositions de la présente loi, l'autorisation d'entrer au Canada et d'y séjourner à titre temporaire comme visiteur ou titulaire d'un permis de séjour temporaire.
(2) A temporary resident must comply with any conditions imposed under the regulations and with any requirements under this Act, must leave Canada by the end of the period authorized for their stay and may re-enter Canada only if their authorization provides for re-entry.	(2) Le résident temporaire est assujetti aux conditions imposées par les règlements et doit se conformer à la présente loi et avoir quitté le pays à la fin de la période de séjour autorisée. Il ne peut y rentrer que si l'autorisation le prévoit.

41. A person is inadmissible for failing to comply with this Act

41. S’agissant de l’étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s’agissant du résident permanent, le manquement à l’obligation de résidence et aux conditions imposées.

(a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and

(b) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.

44.(1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

44.(1) S’il estime que le résident permanent ou l’étranger qui se trouve au Canada est interdit de territoire, l’agent peut établir un rapport circonstancié, qu’il transmet au ministre.

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances

(2) S’il estime le rapport bien fondé, le ministre peut déférer l’affaire à la Section de l’immigration pour enquête, sauf s’il s’agit d’un résident permanent interdit de territoire pour le seul motif qu’il n’a pas respecté l’obligation de résidence ou, dans les circonstances visées par les règlements, d’un étranger; il peut alors prendre une mesure

prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	de renvoi.

Immigration and Refugee Protection Regulations, SOR/2002-227

228.(1) For the purposes of subsection 44(2) of the Act, and subject to subsections (3) and (4), if a report in respect of a foreign national does not include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be	228.(1) Pour l'application du paragraphe 44(2) de la Loi, mais sous réserve des paragraphes (3) et (4), dans le cas où elle ne comporte pas de motif d'interdiction de territoire autre que ceux prévus dans l'une des circonstances ci-après, l'affaire n'est pas déférée à la Section de l'immigration et la mesure de renvoi à prendre est celle indiquée en regard du motif en cause :
. . .	. . .
(c) if the foreign national is inadmissible under section 41 of the Act on grounds of	c) en cas d'interdiction de territoire de l'étranger au titre de l'article 41 de la Loi pour manquement à :
(i) failing to appear for further examination or an admissibility hearing under Part 1 of the Act, an exclusion order,	(i) l'obligation prévue à la partie 1 de la Loi de se présenter au contrôle complémentaire ou à l'enquête, l'exclusion,
(ii) failing to obtain the authorization of an officer required by subsection 52(1) of the Act, a deportation order,	(ii) l'obligation d'obtenir l'autorisation de l'agent aux termes du paragraphe 52(1) de la Loi, l'expulsion,
(iii) failing to establish that they hold the visa or other document as required under section 20 of the Act, an exclusion order,	(iii) l'obligation prévue à l'article 20 de la Loi de prouver qu'il détient les visa et autres documents réglementaires,

	l’exclusion,
(iv) failing to leave Canada by the end of the period authorized for their stay as required by subsection 29(2) of the Act, an exclusion order, or	(iv) l’obligation prévue au paragraphe 29(2) de la Loi de quitter le Canada à la fin de la période de séjour autorisée, l’exclusion,
(v) failing to comply with subsection 29(2) of the Act to comply with any condition set out in section 184, an exclusion order; and	(v) l’obligation prévue au paragraphe 29(2) de la Loi de se conformer aux conditions imposées à l’article 184, l’exclusion;
(d) if the foreign national is inadmissible under section 42 of the Act on grounds of an inadmissible family member, the same removal order as was made in respect of the inadmissible family member.	d) en cas d’interdiction de territoire de l’étranger pour inadmissibilité familiale aux termes de l’article 42 de la Loi, la même mesure de renvoi que celle prise à l’égard du membre de la famille interdit de territoire.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4042-09
STYLE OF CAUSE:	GORDON DOUGLAS ROSENBERRY and MURIEL HARDWICK ROSENBERRY - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	March 9, 2010
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	September 8, 2010

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