Federal Court  Cour fédérale

Date:20120720

Docket: IMM-7453-11

Citation: 2012 FC 910

Ottawa, Ontario, July 20, 2012

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

BEYAN DUNOH CLARKE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In 2008, Mr. Beyan Dunoh Clarke, a refugee from Liberia, was convicted of manslaughter after beating his girlfriend's two-year-old son to death. He was sentenced to 8 years' imprisonment.

[2] In 2011, the Minister of Citizenship and Immigration (by a delegate acting on his behalf) found that Mr. Clarke was inadmissible to Canada based on serious criminality, that he presented a

danger to the public in Canada, and that he should be removed to Liberia. The Minister's decision weighed the risk that Mr. Clarke presented to Canadians and the risk he faced in Liberia, as well as humanitarian and compassionate factors in Mr. Clarke's favour.

[3] Mr. Clarke argues that the Minister's decision was unreasonable because it discounted the risk he faces in Liberia and the favourable humanitarian and compassionate factors in his case. Mr. Clarke also submits that he was treated unfairly because the Minister relied on evidence that had not been disclosed to him. He asks me to quash the Minister's decision.

[4] I can find no basis for overturning the Minister's decision. The Minister carried out a detailed analysis of the relevant evidence and balanced the applicable factors. His conclusion was a defensible outcome based on the facts and the law. In addition, the Minister did not treat Mr. Clarke unfairly in arriving at his conclusion; he did not rely on extrinsic evidence.

[5] The issues are:

1. Was the Minister's analysis of the relevant evidence unreasonable?
2. Did the Minister treat Mr. Clarke unfairly by relying on documents not disclosed to him?

II. The Legal Framework

[6] In general, refugees cannot be returned to a place where they risk persecution or other serious mistreatment (*Immigration and Refugee Protection Act*, [IRPA], SC 2001, c 27, s 115(1) –

see Annex for provisions cited). However, that principle gives way when the person is inadmissible to Canada on grounds of serious criminality, and represents a danger to the Canadian public (s 115(2)(*a*)).

[7] In deciding whether the person can be removed from Canada, the Minister must balance the risk faced by the refugee and the danger to the Canadian public (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, at para 126). In order to respect the person's rights under s 7 of the *Canadian Charter of Rights and Freedoms*, the Minister must also assess whether, on removal, the refugee will likely face a risk to life, liberty or security, and balance that risk against the nature and severity of the person's conduct, the danger to Canadians, and the humanitarian and compassionate considerations in the person's favour (*Suresh*, at para 76-79; *Ragupathy v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151, at para 19).

[8] In effect, the question to be asked is whether it would be disproportionately harsh to remove the person from Canada, considering the risk to Canadians, the risk of harm facing the person, and the humanitarian and compassionate factors in play. Obviously, there will almost always be some risk of persecution or other harm facing the person if removed from Canada because the person will have already demonstrated a well-founded fear of persecution or a substantial risk of other serious harm in his or her country of origin. Therefore, evidence of risk is not enough on its own to forestall removal if the person is inadmissible on grounds of serious criminality. To remain in Canada, the risks and hardships of removal must outweigh the danger to Canadians.

III. The Minister's Decision

[9] The Minister concluded that Mr. Clarke was inadmissible to Canada on the basis of his manslaughter conviction. He went on to consider the circumstances of the offence, as well as Mr. Clarke's behaviour, including his previous and subsequent conduct. He then considered the nature of the risk facing Mr. Clarke if removed from Canada to Liberia, and the humanitarian and compassionate factors in his favour.

(a) *The offence*

[10] Mr. Clarke lived with his girlfriend, Ms. Georgia Swaray, and her two-year-old son, Alfread. In February 2006, Mr. Clarke yelled at Alfread and beat him with a belt. Alfread suffered bruises on his back and, the next day, was lethargic. Later that month, contrary to Mr. Clarke's instructions, Ms. Swaray fed Alfread while Mr. Clarke was at work. When he arrived home, Mr. Clarke noticed that Alfread had been fed and beat him again until he lay unresponsive on the floor. Ms. Swaray carried Alfread to bed. She did not check on him when she left for work the next morning. Mr. Clarke called her shortly after she left and asked her to return home. When she arrived, Alfread lay dead in the bathtub. Mr. Clarke did not call for assistance.

[11] Alfread died of brain trauma. His body was covered in bruises. He showed signs of fasting and dehydration.

(b) *Mr. Clarke's conduct*

[12] Mr. Clarke had been charged with domestic abuse in 2005, but those charges were stayed in 2007. It was alleged that he had beaten his then-girlfriend's nine-month-old child.

[13] After Mr. Clarke was arrested for manslaughter in relation to Alfread's death, he was released on bail. However, he breached the conditions of his release twice and was convicted of violating his bail restrictions.

[14] The Correctional Service of Canada [CSC] assessed Mr. Clarke and found that he was unremorseful for his conduct. He attempted to justify his actions, attributing them, in part, to cultural factors.

[15] However, Mr. Clarke wrote a letter of apology to the victim's family for his behaviour. His family, friends and church support him. He completed a number of programs in prison, including one relating to prevention of violence. Still, CSC thought he presented a moderate-to-high risk for re-offending, and a moderate risk to public safety.

[16] The Minister reviewed Mr. Clarke's entire record, including all of the submissions that had been made on his behalf. He found the offence of manslaughter to be serious, and expressed strong disapproval of Mr. Clarke's behaviour. Regarding Mr. Clarke's suggestion that cultural differences were at play, the Minister cited the sentencing judge's comments that Mr. Clarke had crossed the

line from discipline to abuse "no matter what society you belong to". The victims of Mr. Clarke's crime – Ms. Swaray and her family – had suffered greatly.

[17] The Minister concluded that Mr. Clarke continued to minimize the seriousness of his conduct, and that he showed a "grave" risk of re-offending.

(c) *The Risk to Mr. Clarke in Liberia*

[18] The Minister acknowledged that the human rights situation in Liberia is poor. Mr. Clarke pointed out that he has nowhere to stay in Liberia and has lost contact with his family there.

[19] Mr. Clarke and his family left Liberia in 1999 and moved to Ghana where they lived in a refugee camp. His father had been an opposition politician in Liberia, so the family feared political persecution, as well as ethnic persecution as members of the Mandingo minority.

[20] However, things have gotten better in Liberia, including reforms in justice and security, human rights, healthcare and education. Still, challenges remain in policing, the administration of justice, and corrections. Overall, however, things have improved considerably since Mr. Clarke left Liberia. The Minister concluded that there was no serious possibility that Mr. Clarke would face persecution if removed from Canada.

(d) *Humanitarian and Compassionate Considerations*

[21] The Minister noted that Mr. Clarke had achieved a Grade 12 education in Canada, and had been gainfully employed at the time of his offence. His father and stepmother are stalwart supporters.

[22] Mr. Clarke has two daughters, one with Ms. Swaray and one with another woman. However, he does not maintain a relationship with these children or their mothers.

[23] The Minister concluded that Mr. Clarke's degree of establishment in Canada was not substantial, and that his removal from Canada would not cause him significant hardship.

(e) *Conclusion*

[24] The Minister concluded that Mr. Clarke was not at risk of persecution or serious mistreatment in Liberia. Because he represented a substantial danger to the Canadian public, he should be removed. The humanitarian and compassionate factors in his favour did not outweigh that danger. Therefore, Mr. Clarke could be removed from Canada without violating his rights under s 7 of the Charter.

V. Issue One – Was the Minister's analysis of the relevant evidence unreasonable?

[25] Mr. Clarke argues that the Minister focussed too much on the salacious aspects of his crime and failed to address the real issue: the danger he posed to Canadians in the future. He had no previous convictions, yet the Minister improperly alluded to his "previous dealings with the law,"

namely, his earlier dropped charges. This caused the Minister to give too much weight to the danger Mr. Clarke posed to Canadians and too little weight to the humanitarian and compassionate grounds in his favour. In fact, while the Minister found that Mr. Clarke posed a "grave" risk of re-offending, the evidence did not support that conclusion. The fact that the offence was serious did not mean the risk of re-offending was grave.

[26] As mentioned, the question is whether the person should be removed from Canada notwithstanding the risk of mistreatment he or she may face in the country of origin. In these cases, it can be assumed that there will be some risk to the person because he or she will have already established a case for refugee protection in Canada. Therefore, the Minister must consider the magnitude of that risk, as well as the hardships that removal would create, and balance those considerations against the risk to Canadians if the person were permitted to remain here. A person who has committed a serious crime and presents a danger to Canadians should be removed unless doing so would be disproportionately harsh considering the risks and hardships the person would face on removal.

[27] The Minister found that Mr. Clarke would, in fact, not be at risk if he returned to Liberia. He need not have gone that far – the issue is the degree of risk not whether there is no risk. However, I can find no error in the Minister's analysis of the evidence relating to the risk to Mr. Clarke in Liberia.

[28] Mr. Clarke points out that hundreds of thousands of people have been killed in Liberia, whereas he has only killed one Canadian. Therefore, on balance, he should be allowed to stay in Canada. He faces a greater risk in Liberia than he presents to Canada.

[29] I do not find Mr. Clarke's submission on this point to be persuasive. First, the question is not what has happened in Liberia in the past. (The civil war ended in 2003.) The Minister must assess the current situation and decide whether Mr. Clarke faces a risk of serious mistreatment in the future. Here, the Minister concluded that the current risk to Mr. Clarke is low, and I see nothing unreasonable in the Minister's weighing of the relevant evidence on that issue or his conclusion.

[30] Second, the question before the Minister cannot be answered by a comparative body count. The issue is the nature and magnitude of the risk Mr. Clarke faces on his return, as compared to the risk he presents to Canadians. I accept, as did the Minister, that Mr. Clarke may encounter difficulties in Liberia. But he has killed a child here, and presents a risk of doing so again. Those are the factors that must be balanced, not the number of victims of the civil war in Liberia as compared to the number of Mr. Clarke's victims.

[31] Mr. Clarke also argues that the Minister was not entitled to take into account the previous charge against him relating to another assault on an infant because that charge was stayed. While the Minister accepted that he could not take account of charges that did not result in a conviction, he noted that Mr. Clarke had had "previous dealings with the law."

[32] It is true that the Minister cannot take into account dropped charges. However, he can consider the facts giving rise to those charges because they are relevant to the danger the person poses to Canadians (*Thuraisingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 607, at para 35). Here, while the Minister noted Mr. Clarke's "previous dealings with the law" – admittedly an indirect reference to the dropped charges – he relied on the facts and circumstances surrounding those allegations, not the mere fact that Mr. Clarke had been charged. While it might have been better not to use the phrase "previous dealings with the law," the Minister clearly relied on the underlying facts, strikingly similar to the circumstances giving rise to Mr. Clarke's conviction, as he was entitled to do. That evidence was relevant to the issue of danger to Canadians.

[33] Regarding the Minister's use of the word "grave" to describe Mr. Clarke's likelihood of re-offending, I note that the CSC's assessment used the words "moderate-to-high". The other evidence showed that Mr. Clarke had beaten a child before, lacked remorse, minimized the severity of his crime, and failed to abide by bail conditions. In the circumstances, I cannot conclude that the Minister's use of the term "grave" to describe Mr. Clark's likelihood of committing another serious crime was out of keeping with that evidence.

[34] Finally, Mr. Clarke contends that the Minister gave too little consideration to the humanitarian and compassionate consequences of his removal. In particular, the Minister did not take into account the impact on Mr. Clarke's family.

[35] The Minister considered a letter from Mr. Clarke stating that his father and stepmother were wonderful parents. The Minister also mentioned the other family members – Mr. Clarke's two

sisters and brother. The only other evidence, which the Minister did not cite, was a letter from Mr. Clarke's father in which he described Mr. Clarke's efforts at rehabilitation, and mentioned his two Canadian-born children.

[36] The evidence before the Minister of humanitarian and compassionate considerations in Mr. Clarke's favour was obviously scant. In the circumstances, I cannot fault the Minister's analysis of that evidence. The Minister cited the main evidence. His failure to mention the letter from Mr. Clarke's father was inconsequential in the circumstances.

[37] Overall, therefore, I cannot conclude that the Minister's analysis of the relevant factors – risk, danger, and hardship – was unreasonable given the evidence before him. His conclusion fell within the range of defensible outcomes based on the facts and the law.

VI. Issue Two – Did the Minister treat Mr. Clarke unfairly by relying on documents not disclosed to him?

[38] Mr. Clarke submits that the Minister relied on two documents of which he was unaware. The first was a "Section 44(1) Highlights Report". The second was a "CBSA A44 Narrative Report".

[39] In fact, it appears, and Mr. Clarke concedes, that the two documents are the same, but referred to by different titles. Further, the document is contained in the Certified Tribunal Record, as well as the Applicant's Record. Therefore, there appears to have been no lack of disclosure, and no

unfairness to Mr. Clarke.

VII. Conclusion and Disposition

[40] I find that the Minister's decision was not unreasonable and that it was not arrived at unfairly. The Minister considered the relevant evidence and the appropriate factors and rendered a defensible decision. In doing so, he did not rely on evidence undisclosed to Mr. Clarke. Therefore, I must dismiss this application for judicial review.

[41] Mr. Clarke had sought an extension of time to file his application for leave and judicial review, and no express order has previously been issued in respect of that request. In the circumstances. I will grant the extension of time.

[42] Mr. Clarke proposed the following questions for certification:

1. Does a Minister's delegate who issues a danger opinion under *Immigration and Refugee Protection Act* section 115(2) breach the duty not to consider dropped charges by taking into account the fact that the person concerned had previous dealings with the law?
2. Is a Minister's delegate who issues a danger opinion under *Immigration and Refugee Protection Act* section 115(2) entitled to make a finding of a grave risk of reoffending when there is no such finding by any of the authors of the correctional reports or the sentencing judge?

3. Should a Minister's delegate, when considering a danger opinion under *Immigration and Refugee Protection Act* section 115(2), treat the risk to the person concerned abroad if the person is removed the same as or differently from the risk to Canada if the person is allowed to stay?

4. Does a Minister's delegate who issues a danger opinion under *Immigration and Refugee Protection Act* section 115(2) have a duty to consider explicitly the hardship to the family of the person concerned on removal where the evidence is that the family is close knit and mutually supportive?

5. Is the duty of fairness breached by non-disclosure to the applicant of a document the Canada Border Services Agency considered when deciding whether to seek a danger opinion from the Minister of Citizenship and Immigration under *Immigration and Refugee Protection Act* 115(2) if that document was not considered by the Minister's delegate in issuing the danger opinion?

[43] In my view, none of these questions should be certified. Question 1 does not arise in view of my conclusion that the Minister considered the facts and circumstances surrounding the dropped charge, not the charge *per se*. Question 2 need not be stated given that the Minister's conclusion was supported by the evidence. Question 3 relates to the balancing of risks, an exercise that is well-established in the case law. This is not a case in which Question 4 should be stated because there was little evidence of hardship to the family before the Minister. Because there was no lack of disclosure, Question 5 does not arise.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The request for an extension of time is granted;

2. The application for judicial review is dismissed; and

3. No serious question of general importance will be stated.

"James W. O'Reilly"

Judge

Annex

Immigration and Refugee Protection Act [IRPA], SC 2001, c 27

Principle of Non-refoulement

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

(2) Subsection (1) does not apply in the case of a person

(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Delegate, a danger to the public in Canada;

Canadian Charter of Rights and Freedoms PART I OF THE CONSTITUTION ACT, 1982

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27

Principe du non-refoulement

115. (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire:

a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;

Charte canadienne des droits et libertés PARTIE I DE LA LOI CONSTITUTIONNELLE DE 1982

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

FEDERAL COURT

SOLICITORS OF RECORD

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