Federal Court  Cour fédérale

Date: 20121002

Docket: IMM-567-12

Citation: 2012 FC 1163

Ottawa, Ontario, October 2 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

ISMAEL AZADI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Ismael Azadi, is a Kurdish Iranian born in a refugee camp in Iraq in 1988, where his parents had fled in consequence of the Iraq-Iran war. On December 13, 2001, he accompanied his parents and older sister to Canada as a dependant in the refugee abroad class and became a permanent resident. The Minister has now determined that he is a danger to the safety of the Canadian public and seeks to deport him to Iran, where he has never lived, and despite his prior status as a Convention refugee.

[2] At the age of 20 the applicant was convicted of two charges of robbery on January 29, 2010. He received a 17-month conditional sentence and 102 days pre-sentence custody. On September 8, 2010, he was convicted of possession of cocaine for the purpose of trafficking. For that offence he received a term of imprisonment of two years, following a plea of guilty.

[3] He was given notice of the intention to seek an opinion from the Minister that he constituted a danger to the Canadian public based on section 115(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) and provided disclosure. On the basis of the drug conviction the applicant was ordered deported on July 22, 2011.

Standard of Review and Issues

[4] The applicant seeks judicial review of this decision and raises these issues:

a. Did the Minister's Delegate breach the duty of fairness owed to the applicant by failing to disclose and not providing an opportunity to respond to (i) the Computer Assisted Immigration Processing System (CAIPS) notes from the visa office; or (ii) a report which highlights key aspects of his history?

b. Was the conclusion that the applicant represented a danger to the public reasonable?

c. Did the Minister's Delegate err in not specifically considering the risk facing the applicant among humanitarian and compassionate (H&C) factors?

[5] In my view these arguments fail and the application must be dismissed.

[6] Questions of procedural fairness are assessed on a correctness standard: *Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43; *Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 176, at para 93.

[7] By contrast, this Court recognizes that a Minister's delegate is entitled to a high degree of deference for factual findings under section 115(2)(a) of the *IRPA*. These findings are now reviewed according to the reasonableness standard: *Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 153, at para 32. In applying that standard, the Court should only intervene where the decision fails to demonstrate the existence of justification, transparency and intelligibility or an acceptable outcome defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47.

Decision Under Review

[8] The Minister's Delegate recognized that the criminal history of the applicant was limited to three convictions, but noted that the circumstances and nature of the offences, as underlined by the sentencing judge, were very serious. The Minister's Delegate expressed concern that the applicant's family was not aware of the actual reason for his incarceration and would not provide an effective support network upon release. There was, however, some positive consideration of the applicant's potential for rehabilitation.

[9] After a review of the offences, the Minister's Delegate determined:

> My assessment leads me to a conclusion that Mr. Azadi would be returning to much the same situation he was in prior to his conviction, and that his own lack of insight into his offending behaviour coupled with his choice to mislead his parents with respect to his offences and his sentence are not indicative of the potential for positive reintegration.
>
> Based on the evidence before me that Ms. Azadi's criminal activities were both serious and dangerous to the public, in addition to the lack

> of evidence of rehabilitation, I find, on a balance of probabilities, that Mr. Azadi represents a present and future danger to the Canadian public, whose presence in Canada poses an unacceptable risk.

[10] Turning to the risk faced by the applicant if returned to Iran, the Minister's Delegate addressed evidence related to the treatment of Kurds in that country. He stated:

> The documentary evidence reviewed leads me to conclude that the situation for ethnic Kurds in Iran is such that they are victims of systemic discrimination perpetuated by the Iranian state. That said, the evidence reviewed does not lead me to conclude that the degree of discrimination faced by Kurds in Iran is tantamount to persecution, with the exception of cases noted above, such as known opponents of the Iranian regime, and known members of certain organizations. My review of Mr. Azadi's case does not lead me to a reasonable conclusion that Mr. Azadi is a known dissident, nor that he is a member of such groups, nor that he is politically active. Moreover there is insufficient evidence to indicate that Mr. Azadi's family has continued any association with the group.

[11] Finally, as required, the Minister's Delegate discussed relevant H&C considerations. Despite the emotional hardship on the applicant's family and the fact that he had never lived in Iran, the Minister's Delegate was not satisfied that the applicant's overall degree of establishment in Canada would lead to disproportionate hardship on removal.

Relevant Provisions

[12] Section 115(2)(a) provides for the removal from Canada of an individual otherwise recognized as being at risk or a Convention refugee, as in the applicant's case, where they are inadmissible on grounds of serious criminality and found to constitute a danger to the public. It states:

115. (1) A protected person or	115. (1) Ne peut être renvoyée

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.	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) Subsection (1) does not apply in the case of a person	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada;	a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
[…]	[…]

[13] In contrast, an individual is inadmissible to Canada on grounds of serious criminality under section 36(1)(a) of the *IRPA* on "having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed."

Analysis

The Duty of Fairness Argument

[14] The applicant takes issue with the reliance by the Minister's Delegate on CAIPS notes prepared during an interview of his father by a visa officer on seeking entry to Canada as a refugee

in 2001. He contends that the failure to disclose this material and provide him an opportunity to respond prior to using it as evidence in considering the risks he faced on return to Iran amounted to a breach of the duty of fairness. More specifically, the applicant submits that the Minister's Delegate created a legitimate expectation that only the disclosure materials and submissions would be considered in the course of rendering the opinion.

[15] I acknowledge the importance of disclosure in the context of a danger opinion as stressed by the Court of Appeal: *Bhagwandass v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49. The respondent maintains, and I agree, however, that the applicant has not violated any legitimate expectation due to the lack of specific reference to, and provision of, the CAIPS notes in disclosure materials. Rather, the opposite is true in this particular case. The applicant was on notice from the first disclosure letter that "[t]he Minister may refer to your refugee claim material." Contrary to the applicant's submissions, this could reasonably refer to material, such as CAIPS notes.

[16] As a practical matter, as noted earlier, the applicant had been put on notice that the Minister's Delegate could consider what was in his refugee file. It is also clear from the applicant's submissions that he understood the basis of the initial claim for refugee status and addressed the associated risk for consideration by the Minister's Delegate.

[17] Moreover, I cannot accept the applicant's claim that the CAIPS notes constituted extrinsic evidence to which the Minister's Delegate was required to give him an opportunity to respond before relying on that evidence. The applicant suggests that since these notes were taken during an

interview with his father, he cannot be expected to know of their contents and respond appropriately in submissions. According to the applicant, without his response, the Minister's Delegate ultimately understated the degree of his family's involvement in the Kurdish group known as the KDPI (or Kurdish Democratic Party of Iran).

[18] Reliance on extrinsic evidence generally triggers a duty of fairness and an opportunity to respond (see for example *Dasent v Canada (Minister of Citizenship and Immigration)*, [1995] 1 FC 720, at paras 15-16). The relevant factor in determining what constitutes extrinsic evidence is whether it is "evidence of which the applicant is unaware because it comes from an outside source" or, put another way, it is not known to an applicant: *Dasent*, para 22; see also *Azali v Canada (Minister of Citizenship and Immigration*), 2008 FC 517.

[19] The applicant did not technically supply the information himself to immigration authorities as it was recorded in the CAIPS notes based on an interview with his father. I am nonetheless satisfied that it was sufficiently known, or otherwise reasonably available to the applicant so as not to constitute extrinsic evidence as referred to in *Dasent* and *Azali*. The applicant was present with his entire family at the interview with the visa officer when his father provided that information. Since their application was made jointly, this was the only information in the applicant's immigration file in relation to the entire family's claim.

[20] Third, the Minister did not, in his decision, rely on the contents of the CAIPS notes in any material way. The provenance of the disclosure obligation lies in that aspect of procedural fairness

that requires an opportunity to know, and respond to, the case put against a party. Here, nothing in the CAIPS notes was used against the applicant.

[21] The primary concern which underlies the disclosure obligation to ensure that the applicant has been provided with a reasonable opportunity to participate in a meaningful manner in the decision-making process: *Bhagwandas*, para 22. I find that he was able to articulate the risks associated with removal to Iran by reason of his ethnicity as a Kurd and to participate meaningfully through the preparation of his submissions prior to the rendering of the danger opinion.

[22] The second alleged breach of procedural fairness advanced by the applicant is in relation to the non-disclosure and possible reliance by the Minister's Delegate on the prior section 44(1) admissibility report, and in particular the "highlights" or summary report. The applicant expressed concern that this summary was before the Minister's Delegate as a box was checked indicating this was the case. As the report was not attached, he was unable to respond to any recommendation made therein.

[23] The highlights report was not in the Certified Tribunal Record and affidavit evidence was tendered that it was not in the file. The respondent has also confirmed that the document was not before the Minister's Delegate. Since the highlights report was not ultimately before the decision-maker, there can be no resulting breach of procedural fairness.

[24] Since no additional unknown material was before the Minister's Delegate requiring a response, no fairness breach ultimately occurred. Also, the applicant could have raised any of these concerns much earlier in the disclosure and decision-making process.

[25] Accordingly, the failure to disclose the CAIPS notes and highlights report did not amount to a breach of the duty of fairness in this instance. The applicant was aware that material related to his refugee claim as previously known to him could be considered by the Minister's Delegate.

Reasonableness of Opinion

[26] The applicant contends that the danger opinion of the Minister's Delegate is unreasonable based on the evidence presented in its (i) characterization of the applicant's offences as very serious; (ii) speculation as to the parents' lack of awareness of the length of his sentence; (iii) rejection of his family as an effective support network; and (iv) the existence of some positive commentary by the parole officer.

[27] I accept the respondent's position that the applicant simply disagrees with these factual findings and is asking the Court to re-weigh the evidence; something it is not permitted to do for the purposes of judicial review. I reiterate the Court of Appeal's comments in *Nagalingam* that a high degree of deference is afforded to the Minister's Delegate in making its findings on a section 115(2)(a) determination.

[28] The applicant further contends that the Minister's Delegate did not specifically address the positive observation of the applicant's parole officer and thereby offended the principle expressed in

Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration) [1998] FCJ No 1425. It is argued that the Delegate erred in discounting the opinion of a professional. Here, the Delegate did, in fact, note the existence of some positive considerations, but also noted that parole was neither recommended nor ordered by the National Parole Board (NPB). It would be an unreasonable assessment, when this evidence is viewed in the context as a whole, as it must, to elevate the observation of the parole officer to the level of materiality that triggers the principle in *Cepeda-Gutierrez*.

[29] The applicant further argues that the Minister's Delegate was over-reaching in concluding that, based on the lack of awareness of the applicant's family of the reasons for and length of his sentence, there was a prospect of recidivism. This does not strike me as unreasonable, indeed, it was a factor observed by the parole officer.

[30] The applicant criticises the finding that the applicant's parents did not truly understand why he was incarcerated and that this would impede their role in assisting with his rehabilitation. For example, the Minister's Delegate explained that "[w]hile the support of family and friends is important, the insight of the family members is vital to assist in the promotion of pro-social behaviour, and the limiting of stress factors that could lead to future offending. The documents on file do not lead me to conclude that Mr. Azadi's family understands fully what Mr. Azadi did, or why he did it."

[31] The Minister's Delegate found that the family would not provide an effective support network to prevent his associating with negative peers. The Delegate justified this finding by citing

factors such as an absence of visits since September 2010 while the applicant was incarcerated and a lack of openness among family members. The Minister's Delegate specifically addressed evidence offered in the Community Assessment that his brother could represent a positive role model in his life. He nonetheless found, based on a weighing of the totality of the evidence, that this would not be a sufficient support network so as to lessen the danger to the public.

[32] There is sufficient evidence to support the conclusion that the nature and circumstances of the offences were very serious, namely the statements made by the trial judge during sentencing and by the NPB. Whatever may have been said by the Correctional Service of Canada (CSC) officer on the basis of the initial convictions does not undermine the reasonableness of this broader conclusion.

[33] It is clear from the Supreme Court of Canada's (SCC) determination in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 16 that "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met." In my review of the reasons and evidence, it is readily apparent why the Minister's Delegate made the factual requisite findings and followed a logical chain of reasoning in so doing. I see no reason for overturning the factual determination.

Consideration of Risk among H&C Factors

[34] I am satisfied that the analytical approach adopted by the Minister's Delegate conforms to the relevant jurisprudence (see for example *Hassan v Canada (Minister of Citizenship and*

Immigration), 2008 FC 1069; *Ragupathy v Canada (Minister of Citizenship and Immigration*), 2006 FCA 151 paras 18-19; *Nagalingam*, para 44).

[35] There is no basis in the jurisprudence for the applicant's assertion that the Minister's Delegate was required to consider a wider range of risk factors directly in its determination regarding H&C factors in the context of the danger opinion. I find that the Minister's Delegate approached the H&C factors when raised in the context of section 115(2)(a) appropriately, and reached a reasonable decision in that regard.

[36] It is well established in international law that a person who is determined to be a refugee is not to be returned to the country where they would be at risk of persecution. This principle of non-refoulement finds expression in section 115 of the *IRPA*. At the same time, it *equally* incorporates into Canadian law the exception to the principle in the cases of serious criminality.

[37] The constitutionality of the exception to the principle of non-refoulement depends, in part, on an assessment of the personalized risk of an applicant to persecution, torture or cruel and unusual punishment. As the Court of Appeal said in *Ragupathy*:

> … If, on the other hand, the delegate is of the opinion that the person is a danger to the public, the delegate must then assess whether, and to what extent, the person would be at risk of persecution, torture or other inhuman punishment or treatment if he was removed. At this stage, the delegate must determine how much of a danger the person's continuing presence presents, in order to balance the risk and, apparently, other humanitarian and compassionate circumstances, against the magnitude of the danger to the public if he remains.

> The risk inquiry and the subsequent balancing of danger and risk are not expressly directed by subsection 115(2), which speaks only of serious criminality and danger to the public. Rather, they have been grafted on to the danger to the public opinion, in order to enable a determination to be made as to whether a protected person's removal would so shock the conscience as to breach the person's rights under section 7 of the Charter not to be deprived of the right to life, liberty and security of the person other than in accordance with the principles of fundamental justice. See *Suresh v. Canada (Minister of Citizenship and Immigration)*, especially at paragraphs 76-79 [of the Federal Court of Appeal].

[38] The delegate must balance the threat the applicant poses to the Canadian public against the risk he faces if removed; put otherwise, the exercise is whether the risk posed outweighs the risk faced. In *Jama v Canada (Citizenship and Immigration)*, 2009 FC 781 at para 91, Justice Russell expressed the point this way:

> In other words, the purpose of section 115(2)(a) and the balancing exercise required by the jurisprudence is not to determine whether there are sufficient H&C considerations to exempt the Applicant from a requirement of the Act. The objective is to determine whether the risk that the Applicant poses to the Canadian public outweighs the risks he faces if returned and "other humanitarian and compassionate circumstances." The risk to the Applicant is addressed separately in the weighing process and "other humanitarian and compassionate factors" cannot, in my view, mean anything other than humanitarian and compassionate factors "other" than risk.

[39] The applicant contends that the Delegate erred in failing to consider broader H&C considerations, including general country conditions, or factors that may not reach the threshold of a section 7 *Charter* violation, as part of the H&C considerations of the danger opinion.

[40] I do not accept this argument. The genesis of the exercise lies in section 7 of the *Charter of Rights and Freedoms* and the SCC decision in *Suresh v Canada (Minister of Citizenship and*

Immigration), 2002 SCC 1, [2002] 1 SCR 3. Given that the origin and the purpose of requirement is to guard against possible infringement of section 7 interests it would be wrong to expand the considerations beyond those triggered or encompassed by, section 7. Put otherwise, the "grafting on" of the section 7 analysis to the danger opinion is not to be an expansion, through the back-door, of the broader, general considerations to which the Minister may have regard in the exercise of discretion under section 25, many of which would not be of the same nature or gravity of those that fall within the ambit of section 7 interests.

[41] The applicant has not persuaded me that there was any error in the course of the consideration of the factors mandated by section 7 and the risk associated with removal consequent to an opinion under section 115(2)(a).

Certified Question

[42] The applicant proposes that the following question by certified:

> When deciding whether to issue a public danger opinion under Act section 115(2)(a), does the Minister have a duty to consider relevant risk factors which fall outside the parameters of sections 96 and 97 of the *Immigration and Refugee Protection Act*?

[43] This question does not meet the criteria for certification. Implicit in the question is the extent to which consideration, which falls short of engaging section 7 of the *Charter of Rights and Freedoms*, must be taken into account in issuing an opinion under section 115(2)(a). The Court of Appeal answered the question in *Ragupathy*, paras 18-19:

> … If, on the other hand, the delegate is of the opinion that the person is a danger to the public, the delegate must then assess whether, and to what extent, the person would be at risk of persecution, torture or

> other inhuman punishment or treatment if he was removed. At this stage, the delegate must determine how much of a danger the person's continuing presence presents, in order to balance the risk and, apparently, other humanitarian and compassionate circumstances, against the magnitude of the danger to the public if he remains.
>
> The risk inquiry and the subsequent balancing of danger and risk are not expressly directed by subsection 115(2), which speaks only of serious criminality and danger to the public. Rather, they have been grafted on to the danger to the public opinion, in order to enable a determination to be made as to whether a protected person's removal would so shock the conscience as to breach the person's rights under section 7 of the Charter not to be deprived of the right to life, liberty and security of the person other than in accordance with the principles of fundamental justice. See *Suresh v. Canada (Minister of Citizenship and Immigration)*, especially at paragraphs 76-79 [of the Federal Court of Appeal].

[44] As the proposed question falls within the ambit of the decision of the Federal Court of Appeal, there is no question of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. There is no question for certification.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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