

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120413

Docket: A-64-12

Citation: 2012 FCA 112

Present: BLAIS C.J.

BETWEEN:

SHARMARKE MOHAMED

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Ottawa, Ontario, on April 5, 2012 by video conference.

Order delivered at Ottawa, Ontario, on April 13, 2012.

REASONS FOR ORDER BY:

CHIEF JUSTICE BLAIS

Federal Court
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REASONS FOR ORDER

BLAIS C.J.

[1] This is a motion to stay, pending appeal, the appellant's removal scheduled for April 16, 2012.

[2] Mr. Mohamed is a Somali citizen. He was 27 years old when he came to Canada and made a refugee claim. In 1991, he was found to be a Convention refugee and became a permanent resident of Canada in December 1991.

[3] Unfortunately, Mr. Mohamed's settlement in Canada has not been quite peaceful. He got married twice, had two children from each of those marriages, and is now living separate from his

second wife and children. He worked ten years as a chemical laboratory technician and left British Columbia when the company went bankrupt in 2005.

[4] Meanwhile, he was convicted of assaulting his roommate with a butcher knife and of robbing three banks. He was also charged with several other offences under the *Criminal Code*, including assault, assault with weapons and assault causing bodily harm.

[5] Not surprisingly, the Immigration Review Board issued in 2009 a deportation order against Mr. Mohamed on grounds of serious criminality.

[6] In July 2011, the Minister's delegate issued an opinion that Mr. Mohamed constituted a danger to the public pursuant to subsection 115(2) of the *Immigration and Refugee Protection Act* (IRPA). Mr. Mohamed applied for a judicial review of the ministerial delegate's danger opinion.

[7] The Canada Border Services Agency (CBSA) made arrangements to remove Mr. Mohamed to Somalia in October 2011. However, the CBSA agreed to differ the removal pending the determination of Mr. Mohamed's application for judicial review of the danger opinion.

[8] On January 2012, Justice Harrington of the Federal Court dismissed the application. He nevertheless certified the following question:

In the context of a danger opinion analysis, if the Minister determines that there would be no personalized risk faced by the person concerned and therefore avoids balancing the risk posed by the person with the risk faced, is the Minister then

required by section 7 of the *Charter* to balance the generalized risk that would be faced at the humanitarian and compassionate stage of the analysis?

[9] The appellant filed a notice of appeal on February 17, 2012.

[10] Upon the dismissal of the application for judicial review, the CBSA made new arrangements for Mr. Mohamed's removal to Bossaso, Puntland, in northern Somalia. Unless Mr. Mohamed's stay motion pending appeal is granted, his removal will take place on April 16, 2012.

[11] For his motion to be granted, Mr. Mohamed must demonstrate that he satisfies each part of the tripartite test stated in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, [1988] F.C.J. No. 587 (F.C.A.). He must demonstrate that (i) there is a serious issue to be tried; (ii) he would suffer irreparable harm were the motion denied; and (iii) the balance of convenience is in his favour.

SERIOUS ISSUE TO BE TRIED

[12] It is important to remember that according to the principle of "non-refoulement" in refugee law, a refugee should not be returned to a country where he or she would risk being persecuted. The non-refoulement principle is found at section 115 of the IRPA. This section prohibits the return of Convention refugees to a country where there is a risk of persecution on Convention grounds or is at risk of torture or cruel and unusual treatment or punishment. Nevertheless, subsection 115(2) of the IRPA provides exceptions to the non-refoulement principle, such as where the person is

inadmissible on grounds of serious criminality and constitutes a danger to the Canadian public in the opinion of the Minister.

[13] Many courts in Canada have addressed this issue over the years.

[14] First of all, I should note that in this case the application judge, in certifying a question, recognized the existence of a serious question of general importance. As my colleague Justice Evans said in *Palka v. Canada (Minister of Public Safety and Emergency Preparedness)* 2008 FCA 165 at paragraph 9, “[i]t should be easy to persuade a Judge of this Court that a question certified for appeal by a Judge of the Federal Court is not frivolous or vexatious”.

[15] Further, it is to be remembered that certifying a question of general importance triggers an unconstrained appeal to this Court (*Richter v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 73 at paragraphs 9 and 10). Therefore, to determine whether there is a serious issue, I must not only look at the certified question, but also to the appellant’s arguments. The essence of the appellant’s argument can be found at paragraphs 59-61 of his memorandum of arguments:

The Applicant submits that in finding that the only risk that would be faced by the Applicant upon his return to Somalia was one that was generally faced by the population, the Minister circumvented the balancing that is required by section 7 of the *Charter*. Put another way, there was no balancing done by the Minister at this stage because no personalized risk was found.

The Applicant submits that while this in and of itself is not necessarily problematic, in order for the danger opinion regime to conform with the principles of fundamental justice under section 7 of the *Charter*, there must be a balancing of the risk faced by the person concerned at some stage of the analysis; if not at the danger determination stage, than at the humanitarian and compassionate grounds stage.

To allow the Minister to avoid balancing the risk faced upon return to the country of origin by simply finding that this risk is of generalized nature, would allow a person's section 7 rights to be violated in a way that is not in accordance with the principles of fundamental justice.

[16] As for the Minister, he refutes the existence of a serious question. He submits that refugee law does not prohibit the removal of a refugee to a country where the whole population faces some generalized risk to their life. He adds that such principle is well established and clear. He refers to a series of authorities, such as *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, and *Nagalingam v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 153, to the effect that the delegate must assess the personalized risk rather than the generalized risks. The Minister also mentions *Jama v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 781, where Justice Russell rejected an argument similar to the appellant's position.

[17] I note that the issue on appeal has been litigated in the United Kingdom all the way to the European Court of Human Rights (ECHR) in a case involving a similar context. The ECHR found that risks generally faced by the population may amount to a real risk of ill-treatment to the deportee (*Sufi and Elmi v. United Kingdom*, [2011] ECHR 1045 at paragraphs 248, 293). But foreign cases are not binding on this Court. In fact, there is no Canadian authority to support Mr. Mohamed's arguments that the Minister's delegate must consider generalized risks as part of the danger opinion analysis.

[18] Nevertheless, since the trial judge has certified a question, and since the serious question prong is readily satisfied, I conclude that there is a serious issue to be tried.

IRREPERABLE HARM

[19] Both parties agree that Somalia is at this time one of the most dangerous places in the world. Nevertheless, we should nuance such general assertion. In fact, the evidence provided by both sides demonstrates that the situation is much more dangerous and unstable in the south and the area surrounding the Somali capital, Mogadishu.

[20] The unstable situation is faced by Somalis on a daily basis. Amnesty International's report "Routinely Targeted: Attacks on Civilians in Somalia", dated May 6, 2008, states the following:

Conclusion: A Human Rights Crisis in Southern and Central Somalia

There is a dire human rights situation in southern and central Somalia, which has largely contributed to the current humanitarian emergency. One million Somalis are internally displaced; hundreds of thousands are newly displaced refugees; ... and the entire population of Mogadishu carries the scars of having witnessed or experiences egregious violations of human rights and international humanitarian law. ... Somali civilians have been routinely targeted and have suffered violations of human rights and international humanitarian law in the conflict areas of southern and central Somalia, on the roads as they fled conflict areas, and in camps and temporary settlements to which they fled.

(Appellant's motion record, tab 9, page 25)

[21] On the other hand, the situation in the north where the appellant would be deported looks more stable. The *Operational Guidance Note* regarding Somalia issued by the UK Border Agency provides at paragraph 2.4.5 that:

Somaliland and Puntland, are in general relatively safe. A long-standing dispute exists over the territories of Cayn, Sool and Sanag, with both Somaliland and Puntland claiming them and the Sool-Sanad-Cayn alliances fighting to remain part of the original state of Somalia. General insecurity resulting from armed violence continues to be the main protection concern in the North-West regions of Somaliland and there has also been an increase in violence and assassinations in Puntland, since the beginning of 2011, mostly in Galkayo, Bossaso and areas around Galgala.

and at paragraph 2.4.8:

Mogadishu airport continues to function normally. There are scheduled air services to a number of destinations in Somalia – Mogadishu, Bosasso, Hargeisa, Berbera, Burao and Galcaiyo.

and also at paragraph 3.7.8:

Conclusion. Large parts of northern Somalia are in general relatively safe regardless of clan membership. Somaliland and Puntland remain generally safe despite some armed violence and targeted assassinations. In other parts of Somalia it is unlikely that any Somali belonging to one of the major clan-families – their immediate clan groups or associated sub clans – would be able to demonstrate that they have a well-founded fear of ill-treatment on return on the basis of their clan affiliation alone.

(Respondent's motion record, page 298)

[22] In Human Rights Watch's report, "Harsh War, Harsh Peace, Abuses by al-Shabaab, the Transitional Federal Government, and AMISOM in Somalia, at page 179, it is reported that:

Somalia remains mired in a brutal conflict between the Transitional Federal Government (TFG), which holds only a sliver of the capital, Mogadishu, and armed

opposition groups that control most of the country. Over the past year hostilities have raged in strategically important areas, including Mogadishu, while much of the rest of Somalia has enjoyed relative peace.

(Appellant's motion record, tab 15, page 174)

[23] In another document provided by the International Crisis Group, "Somalia, The Transitional Government on Life Support", dated February 21, 2011, at page 231 (the "ICG's report"):

Yet, the situation is not as bleak as it may seem. Some parts of Somalia, most notably Somaliland and Puntland in the north, are relatively stable, and as the ill-fated Union of Islamic Courts demonstrated in 2006, it is possible to rapidly re-establish peace and stability in central and south Somalia if the right conditions exist. Contrary to what is often assumed, there is little anarchy in the country. Local authorities administer most areas and maintain a modicum of law and order. Somalis and humanitarian agencies and NGOs on the ground know who is in charge and what the rules are and get on with their work.

(Appellant's motion record, tab 16, page 228)

[24] It is not my duty at this stage to review the ministerial delegate's danger opinion. Nor is it my duty to second guess all the ministerial delegate's findings of fact regarding the situation in Somalia. That being said, I have to make my own findings on whether Mr. Mohamed will suffer irreparable harm if he is deported to his country of origin.

[25] Although the situation is particularly difficult in southern and central Somalia, including Mogadishu, there is also evidence that the day-to-day life goes on in many parts of those regions. As the UK Border Agency's report, "Somalia: Report of Fact Finding Mission to Nairobi" puts it:

[A]part from some areas, you can see normal life in Mogadishu, like children playing in the street. Most of the city is traversable but it depends who you are.

Everybody who is not Somali is at risk, including AMISOM and NGOs. For ordinary Somalis who go about their day-to-day life Mogadishu is reasonably safe. They can go shopping and to the market, children go to school. There is public transport, minibuses and taxis are available. The Mogadishu economy is booming and thriving on the lack of regulations. Quite a lot of people have left Mogadishu but there is still evidence of a normal life.

In [the security advisor's] opinion, returnees would not be at risk at all in Mogadishu.

UK Border Agency, Somalia: Report of Fact Finding Mission to Nairobi, 9-15 September 2010, p. 22 (Affidavit of K. Lynch, Exhibit "C") [RMR, Tab 2-C].

(Respondents motion record, page 351)

[26] Those remarks are corroborated by the ICG's report, precited:

Contrary to what is often assumed, there is little anarchy in the country. Local authorities administer most areas and maintain a modicum of law and order. Somalis and humanitarian agencies and NGOs on the ground know who is in charge and what the rules are and get on with their work.

"Somalia: The Transitional Government of Life Support, dated February 21, 2011 [Affidavit of F. Dominguez, Exhibit "J"]

(Respondent's motion record, page 352)

[27] I also take into consideration the affidavit of Mr. Adam Parsons, the CBSA officer who was assigned to arrange the appellant's removal from Canada.

[28] Mr. Parsons filed his affidavit in support of the respondent's record. At paragraphs 9 and 10 he states that:

- a. The CBSA is making arrangements to remove Mr. Mohamed to Somalia. In my experience, removals to Somalia are complicated. However, the Pacific

Region Inland Enforcement Section has successfully removed several individuals to Somalia over the past few years as a result of the coordinated efforts of the CBSA, the CBSA Migration Integrity Officer or Liaison Officer at the Canadian Embassy in Nairobi, Kenya and the commercial airline carriers.

- b. The CBSA's current protocol for removal to Somalia requires pre-approval by the commercial air carrier, which confirms that the proposed final destination in Somalia is a suitable destination in light of the deportee's clan and sub-clan support group. Once approved by the airline, the removal to Somalia is routed through Nairobi, Kenya. From Nairobi, the deportee flies to Mogadishu on a commercial flight and then on to his or her final destination in Somalia.

(Respondent's motion record, page 004)

[29] Mr. Parson's affidavit also refers to a letter faxed by Mr. Mohamed's counsel where the latter states the following:

My client has advised me that he was told by a CBSA officer that he would likely be flown to Kenya and from there taken to Mogadishu, Somalia.

Mr. Mohamed is requesting that he instead be taken to Bosaso, in northern Somalia. He has suggested that it would be easier to fly to Djibouti and then proceed to Bosaso from there. His request is based on the humanitarian crisis that is currently plaguing Somalia, and particularly, the Mogadishu area. He has also indicated that he may have some distant relatives in Bosaso who could assist with his resettlement.

[30] Paragraph 12 of Mr. Parson's affidavit further refers to a sworn declaration signed by Mr. Mohamed where he states that: "I am under a deportation order from Canada, and I am willing to be removed to the city of Mogadishu".

[31] I have reviewed the information provided by the parties concerning the situation in northern Somalia, particularly the situation in the city of Bossaso. I have also reviewed the information

provided by Mr. Parsons with respect to the capacity to remove Mr. Mohamed to Bossaso, together with Mr. Mohamed's comments and suggestions concerning his capacity of resettlement in Bossaso. I am not convinced that he will be personally at risk of persecution on Convention grounds nor at risk of torture or cruel and unusual treatment or punishment if he is deported to Somalia.

[32] As for the appellant's concern that this appeal would become moot were he removed before the hearing, such inconvenience does not amount per se to irreparable harm. Otherwise, irreparable harm would be readily found every time a removal order is executed before an appeal hearing. This would deny the Court the discretion to assess irreparable harm on a case-by-case basis. Removal will not impede the appellant from instructing his counsel from abroad.

[33] Accordingly, I have not been persuaded by the appellant that he will suffer irreparable harm were he deported to Somalia.

BALANCE OF CONVENIENCE

[34] Balance of convenience weighs heavily in favour of the Minister where the individual facing removal has been convicted of criminal offences and found to be a danger to the public. In *Sittampalam v. Canada (Minister of Citizenship and Immigration)* 2010 FC 562, Justice Shore summarized the factors one must consider in such situation:

[70] This Court has recognized that, where an applicant has been convicted of criminal offences, the balance of convenience weighs heavily in the Minister's favour:

[7] With respect to the balance of convenience test, I am in agreement with the reasoning of Rothstein J. in *Mahadeo v. Canada (Secretary of State)*, October 31, 1994, (unreported), Court File IMM-4647-94

(F.C.T.D.). In that case, Rothstein J. stated that when the applicant is guilty of welfare fraud or has been convicted of a criminal offence in Canada, the balance of convenience weighs heavily in favour of the respondent. In this case the applicant was convicted of assault causing bodily harm, which I find to outweigh any consideration of the emotional devastation of the applicant's family. I therefore find that the balance of convenience in this case lies with the respondent. [Emphasis added]

(*Gomes v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 199 (QL), 91 F.T.R. 264; reference is also made to *Townsend v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 247, 53 A.C.W.S. (3d) 358 at para. 6; *Thamotharampillai*, above, at para. 10; *Moncrieffe v. Canada (Minister of Citizenship and Immigration)* (1995), 62 A.C.W.S. (3d) 964; [1995] F.C.J. No. 1576 (QL) T.D. at para. 13; *Grant v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 141, 112 A.C.W.S. (3) 128 at para. 10).

[71] The comments of Justice Evans of the Federal Court of Appeal in *Tesoro v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148, [2005] 4 F.C.R. 210, where the applicant had been convicted of serious property fraud offences and had sought a stay of removal, are equally applicable:

[47] However, if I had determined that Mr. Tesoro's removal would cause irreparable harm, on the ground that the effects of family separation were more than mere inconveniences, I would have located the harm at the less serious end of the range, and concluded that, on the balance of convenience, it was outweighed by the public interest in the prompt removal from Canada of those found to be inadmissible for serious criminality. If the administration of immigration law is to be credible, the prompt removal of those ordered deported must be the rule, and the grant of a stay pending the disposition of legal proceedings, the exception. [Emphasis added].

[72] The Court must consider that Mr. Sittampalam is defined as a danger to the public in Canada. If a person is a danger to the public, the public interest and the balance of convenience favours not staying removal from Canada (*Jama v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 374, 166 A.C.W.S. (3d) 297 at paras. 8, 10, 24-15 and 32; *Choubaev v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 816, 115 A.C.W.S. (3d) 854 at para. 17).

[73] It is reiterated that in upholding section 196 of the IRPA in *Medovarski*, above, the Supreme Court of Canada held that the intent of the IRPA is to prioritize the security of Canada. This intent is reflected in the scheme to facilitate the removal of permanent residents who have engaged in serious criminality, and the IRPA's emphasis on the obligation of permanent residents to behave lawfully while in Canada.

Sittampalam v. Canada (Minister of Citizenship and Immigration), 2010 FC 562, at paras. 70-73.

(Respondent's motion record, page 354)

[35] In the case at bar, Mr. Mohamed had been engaged with the criminal justice system for two decades and as a result of his criminal history, he has been found to be inadmissible to Canada and a danger to Canadian public.

[36] We should also keep in mind that the Minister has a legal obligation to deport the appellant at the first opportunity.

[37] The fact that the appellant is detained does not favour the appellant. To the contrary, he is detained because he was convicted of serious crimes and is a danger for the public. Upon his release, he will remain a danger for the Canadian public. I have no hesitation to conclude that the balance of convenience favours the Minister.

[38] Therefore, although I found that there was a serious issue to be tried, since the appellant cannot persuade me that he will suffer an irreparable harm and since the balance of convenience favours the Minister, the appellant's motion for a stay is dismissed.

“Pierre Blais”
Chief Justice

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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