Federal Court  Cour fédérale

Date: 20150831

Docket: IMM-8075-14

Citation: 2015 FC 1033

Ottawa, Ontario, August 31, 2015

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

HANAD AHMED IBRAHIM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Hanad Ahmed Ibrahim, (the "Applicant") seeks judicial review of a decision of the Delegate (the "Delegate") of the Minister of Citizenship and Immigration (the "Respondent"), dated November 17, 2014, by which the Applicant was found to be a danger to the public.

[2] The Applicant is a citizen of Somalia. He came to Canada in March 2000 as a member of a family class. He became involved in criminal activity, leading to criminal charges beginning in July 2000 and to convictions, beginning in October 2000, initially as a young offender.

[3] The Applicant was issued a deportation order on April 2, 2007. He subsequently made application for a Pre-Removal Risk Assessment ("PRRA") in December 2009. After initial dismissals of his PRRA applications, he received a positive decision in February, 2013 and was found to be at risk if returned to Somalia.

[4] On April 23, 2013, the Minister of Public Safety and Emergency Preparedness (the "Minister") submitted a request for an opinion for the Respondent, pursuant to paragraph 115(2)a of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

[5] Submissions were filed by the Canada Border Services Agency (the "CBSA"), on behalf of the Minister. The Applicant filed responding arguments and evidence. Ultimately, a decision was made by the Delegate of the Respondent, finding the Applicant to be a danger to the public. The effect of this decision is to render the Applicant open to removal to Somalia, in other words, to refoulement.

[6] The Applicant alleges bias, that is a breach of procedural fairness, arising from the fact that the Delegate copied, verbatim and without attribution, the whole of the submissions made by the CBSA on the issue of risk if he were returned to Somalia. He also argues that the decision in this case is unreasonable in its assessment of danger.

[7] The issue of procedural fairness is reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 S.C.R. 339 at paragraph 43. The findings about dangers are factually driven and that issue is reviewable on the standard of reasonableness; see the decision in *Nagalingam v Canada (Minister of Citizenship & Immigration)*, [2009] 2 F.C.R. 52 (F.C.A.) at paragraph 32.

[8] The Applicant submits that the fact that the Delegate appropriated the Minister's risk submissions, breached his right to a fair disposition of the Minister's request for a danger opinion. He relies upon the decisions in *Es-Sayyid v Canada (Minister of Public Safety and Emergency Preparedness)*, [2013] 4 F.C.R. 3, *Janssen-Ortho Inc. et al v Apotex Inc.* (2009), 392 N.R. 71 and *Cojocaru v British Columbia Women's Hospital and Health Centre*, [2013] 2 S.C.R. 357 in support of this argument.

[9] The Respondent argues that the adoption by the Delegate of parts of the Minister's submissions does not, by itself, support a finding of bias on the part of the Delegate. He submits that the reasons are clear and meet the standard of reasonableness.

[10] In my opinion, the dispositive issue in this application is the question of procedural fairness raised by the Applicant.

[11] The Applicant frames the breach of procedural fairness in terms of bias. The test for bias was set out by the Supreme Court of Canada in *Committee for Justice and Liberty et al. v National Energy Board et al.*, [1978] 1 S.C.R. 369, at page 394 as follows:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[12] I am not persuaded that the wholesale incorporation of the Minister's submissions on risk in the decision, verbatim and without attribution, arises to the level of bias. At the same time, however, failure to show bias does not mean that no breach of procedural fairness occurred.

[13] I note that a breach of procedural fairness is to be assessed in context of the particular kind of decision making in issue. The context, in this case, is the request by the Minister for a danger opinion from the Respondent.

[14] Turning to the decision of the Federal Court of Appeal in *Bhagwandass v Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C.R. 3, such a request is an adversarial process where the Minister and an affected person have the opportunity to present evidence and arguments. The Respondent, by his delegate, makes the decision. Such decision involves both questions of fact and law, and is reviewable on the standard of reasonableness; see the decision in *Nagalingam*, *supra*.

[15] In *Cojocaru*, *supra* at paragraph 52, the Supreme Court of Canada identified factors to be considered when determining whether copying by a decision maker of the arguments advanced by one party to litigation is sufficient to justify setting the decision of a trial judge and remitting

a matter for a new trial. Those factors include the extent of the copying, the quality of the copying and the nature of the case.

[16] In the present case, the Respondent argues that if courts in *Es-Sayyid, supra*; *Janssen-Ortho Inc. et al, supra* and *Cojocaru, supra* did not find the unattributed adoption of one party's submissions, by a judge, to be such undesirable conduct as to give rise to a breach of procedural fairness, similar conduct by a statutory decision-maker should be subject to an equal, if not higher, degree of immunity. I disagree.

[17] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 Justice L'Heureux-Dubé, identified certain non-exhaustive factors to be considered when assessing the requirements of procedural fairness in a given case, including the nature of the decision and the decision-making process; the relevant statutory scheme; and the importance of the decision to the person concerned. The Court said the following about the last factor:

> A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113:
>
> > A high standard of justice is required when the right to continue in one's profession or employment is at stake. … A disciplinary suspension can have grave and permanent consequences upon a professional career.
>
> …

> The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

[18] The importance of the decision here to the Applicant is highly relevant. He had obtained protection in Canada, pursuant to section 113 of the Act, when a positive decision was made upon his PRRA application.

[19] That status was subject to being vacated when the Minister asked for a danger opinion, since acceptance of the Minister's request could lead to removal of the Applicant from Canada to Somalia.

[20] Subsection 115(1) affords protection against refoulement to a protected person. However, that protection can be withdrawn in certain circumstances. Subsection 115(1) and paragraph 115(2)a provide as follows:

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.	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) 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;

[21] The potential for refoulement of the Applicant is undoubtedly a matter of grave concern to him. It follows that a decision leading to such consequence should be subject to a high degree of procedural fairness.

[22] In those circumstances and considering the adversarial nature of the danger opinion process, as discussed in the jurisprudence, I am satisfied that the Delegate breached the duty of procedural fairness due to the Applicant in the determination of the Minister's request for a danger opinion, and the application for judicial review will be allowed. While no person seeking status under the Act, as was the Applicant in pursuing the PRRA application, is entitled to a positive result, he is entitled to a fair process. That right cannot be trumped by administrative efficiency.

[23] The parties also addressed the Delegate's decision on the "danger" element of the Minister's request. I will not address those arguments since, in my opinion, the decision of the Delegate is flawed. The decision of the Delegate will be set aside and the matter remitted to a different Delegate to be re-determined.

[24] The Applicant requests costs upon this application. Pursuant to the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, section 22, costs may be awarded in immigration judicial review proceedings where there are "special reasons" for doing so.

[25] I am not persuaded that such "special reasons" exist in this case. The Applicant raised an arguable case, as illustrated by the fact that leave was granted in this file. The Respondent responded with his arguments, as he was entitled to do. There is no basis for the award of costs.

[26] Finally, there is the issue of certification of a question. The Applicant proposed a question addressing the danger portion of the Delegate's decision. The Respondent made submissions on the proposed question. Since the disposition of this application for judicial review does not address that element of the decision, I decline to certify the proposed question.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review will be allowed. The decision of the Delegate will be set aside and the matter remitted to a different Delegate to be re-determined, no order as to costs, no question for certification arising.

"Elizabeth E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Anthony Navaneelan	FOR THE APPLICANT
Michael Butterfield	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mamann, Sandaluk & Kingwell, LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT