Federal Court  Cour fédérale

Date: 20160412

Docket: IMM-2575-15

Citation: 2016 FC 405

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 12, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

EVONNE MAY RIAHI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of an immigration officer's decision dated May 18, 2015, whereby an exclusion order was issued against the applicant under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. Facts

[2] The applicant, Evonne May Riahi (age 37), is a citizen of Bermuda. In 2002, the applicant married Abdelhafid Riahi, a Canadian citizen, and they have a daughter together.

[3] The applicant alleges that she has been going back and forth between Canada and Bermuda on a tourist visa since 2001, mainly for health reasons.

[4] The parties do not agree on certain facts important to this application for judicial review. It appears that the applicant arrived in Canada on August 27, 2014, and obtained a visitor visa with the condition that she leave Canada no later than February 27, 2015.

[5] The appellant claims that she left Canada in February 2015 to return the same day. In May 2015, the applicant and her family went to the United States on vacation. Upon returning to Canada, on May 17, 2015, they reported to the port of entry in Stanstead, Quebec, at around 21:53. Unable to find any record of the applicant having left Canada in February 2015 to return right away, the immigration officer made an inadmissibility determination under subsection 44(1) of the IRPA since the applicant breached the Act, specifically, subsection 20(1) of the IRPA.

[6] That alleged breach of subsection 20(1) of the IRPA led to a one-year exclusion order issued against the applicant because she was unable to prove that she held a visa and other regulatory documents required to enter Canada (see in particular subparagraph 228(1)(*c*)(iii) and

subsection 225(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]). The applicant left the Stanstead Border Crossing Station at 02:43, on May 18, 2015. Less than an hour after leaving the Stanstead Border Crossing Station, the applicant was arrested by the Royal Canadian Mounted Police (RCMP) after she had crossed the Canada-United States border at a location other than a port of entry, by taking an unguarded road. The applicant was brought to the Stanstead port of entry, handed over to Canadian immigration authorities, and then transferred to the Immigration Holding Centre [IHC] in Laval, Quebec.

[7] According to the respondent, the applicant was allegedly informed of her right to consult an attorney and her right to be represented by counsel before the Immigration and Refugee Board with respect to her being detained before she was transferred to the IHC, at around 20:20, on May 18, 2015.

[8] On May 20, 2015, following an inadmissibility report issued against the applicant for her breach of her no return without prescribed authorization, under subsection 52(1) of the IRPA, a deportation order was issued against the applicant under subparagraph 228(1)(*c*)(iii) of the IRPR.

[9] Lastly, on June 25, 2015, the applicant left Canada with her daughter, headed for Bermuda.

[10] In her amended reply memoranda, the applicant confirmed that she was only contesting the exclusion order and the inadmissibility report that led to the exclusion order.

III. Issues in dispute

[11] The Court is of the opinion that this application raises the following issues:

1) Should the application for judicial review be dismissed because the applicant does not have clean hands?
2) Was the applicant's fundamental right to assistance from a counsel infringed?
3) Are the inadmissibility report and the exclusion order, both dated May 18, 2015, legal?

IV. Analysis

A. *Applicant's clean hands*

[12] The respondent argues that this Court should dismiss the application for judicial review, without examining the application on the merits, because the applicant does not have clean hands given the false representations she made to a Canada Border Services Agency [CBSA] officer about an important fact. For her part, the applicant argues that the clean hands theory has been criticized in Quebec and that it is a dangerous theory.

[13] The grant of an immigration judicial review is a discretionary remedy which may be refused, without the Court having studied the case on its merits, if the applicant's hands are not clean (*Sallam v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 427, at paragraphs 16 and 17; *Raslan v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 189, at paragraphs 14 and 18). The Federal Court of Appeal specified, however, that it

is not due to an applicant's unclean hands that the Court must refuse to hear the application on its merits (*Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2006 FCA 14, at paragraph 9 [*Thanabalasingham*]). When exercising its discretion, the Court is guided by the factors set out in paragraph 10 of *Thanabalasingham*:

> [10] In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand. [My emphasis.]

[14] In this case, at first glance the applicant's behaviour does not seem to reflect that of a person with clean hands, given the inconsistencies identified by the respondent with respect to the applicant's allegations and behaviour. The applicant alleges that she left Canada in February 2015 and returned the same day. For its part, the respondent submits that the applicant knowingly lied to the Canadian authorities about her departure in February 2015; in so doing, the applicant's hands are not clean. It is impossible for the Court to determine whether the applicant did in fact leave Canada in February 2015 to return the same day, because no evidence, not even a simple receipt or bank statement indicating purchases in the United States, was submitted to the Court. Is the applicant trying to voluntarily mislead the Court or is the applicant simply raising allegations with no evidence to corroborate her statements? The Court does not know.

[15] However, the fact that the applicant tried to enter Canada illegally through a location other than a port of entry, by taking an unguarded road less than one hour after having received an exclusion order, shows contempt for the Canadian immigration system.

[16] In her affidavit, the applicant states that she has never been arrested, whereas the evidence unequivocally shows that after she entered Canada illegally, the applicant was arrested and detained. It is true that the applicant indicated in her amended reply memoranda that when she mentioned that she had never been arrested, she was referring to her life in general, not the incident of May 18, 2015. Nevertheless, this inconsistency raises doubts about the truth of her entire story.

[17] In short, although the Court is of the opinion that *prima facie* sufficient reasons exist allowing the Court to exercise its discretion to refuse to grant a judicial review, without reviewing the file on the merits, the Court will nonetheless review the case given the applicant's alleged infringement of a fundamental right under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, comprising Schedule B of the *Canada Act 1982* (UK), 1982, c. 11 [Charter].

B. *Right to counsel*

[18] The applicant argues that the fundamental right, as set out in paragraph 10(*b*) of the Charter, the right to retain and instruct counsel and to be informed of this right on arrest or detention, was infringed. Given this alleged breach, the applicant is contesting the validity of the exclusion order issued against her. The applicant acknowledges that an interview with an

immigration officer does not trigger a right to counsel (*Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053); however, she stated that her liberty had been restrained, which thus invoked that right (*Dragosin v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 81 [*Dragosin*]; *Huang v. Canada (Minister of Citizenship and Immigration)*, [2002] 3 F.C.R. 266, 2002 FCT 149; *Chen v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 910). The applicant said that she was detained when she was interrogated by the officer on May 17, 2015, and therefore, her right to counsel and to be informed of this right was infringed at that moment (*Dragosin*, above). The applicant was allegedly not informed of this right until the exclusion order was issued against her.

[19] For its part, the respondent agrees with the applicant that a person examined at a port of entry has not been "detained" within the meaning of paragraph 10(*b*) of the Charter (*Heredia v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1215, at paragraphs 14-15 [*Heredia*]). The respondent therefore argues that the applicant was not in detention before the exclusion order was issued, because between 21:53 on May 17, 2015, and 02:43 on May 18, 2015, the applicant was not arrested or detained.

[20] Paragraph 10(*b*) of the Charter states that everyone has the right on arrest or detention to retain and instruct counsel and to be informed of that right. In this case, the applicant argues that this right was infringed the moment she was examined by the officer, given that her liberty had been restrained.

[21] The Court has already acknowledged that a person who is examined through the general screening process for persons seeking to enter Canada is not in "detention" or under "arrest" within the meaning of paragraph 10(*b*) of the Charter:

> [14] The right to retain and instruct counsel is protected under paragraph 10(*b*) of the Charter when a person is under "arrest" or in "detention."
>
> [15] In *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 (available on CanLII), the Supreme Court held that a person seeking to enter Canada and who is subject to an examination at the port of entry has not been "detained" within the meaning of paragraph 10(*b*) of the Charter because the examination is a routine part of the general screening process for persons seeking to enter Canada and the element of state compulsion is not sufficient to constitute a "detention" in the constitutional sense (see also *Chen v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 910, [2006] F.C.J. No. 1163). Moreover, at the hearing, counsel for the applicant admitted that when the applicant was being examined by the CBSA officer, he was not in "detention" within the meaning of paragraph 10(*b*) of the Charter and did not benefit from the right to retain and instruct counsel at that time.
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> (*Heredia*, above, at paragraphs 14 and 15).

[22] In this case, the applicant acknowledged that an examination does not trigger the right set out in paragraph 10(*b*) of the Charter, but she nevertheless argues that there was an infringement of her right to retain and instruct counsel given that she had allegedly been "detained." However, the applicant did not submit any evidence to confirm her statements, namely, that she had apparently been detained before the exclusion order had been issued against her. Moreover, no evidence was submitted to the effect that the officers had allegedly deviated from the procedures normally followed in this type of situation. Thus, the applicant did not submit any evidence or argument as to why the Court should not have applied the line of authority in which this type of examination does not trigger the right to retain and instruct counsel.

[23] For these reasons, the Court must dismiss the applicant's claims that her right to retain and instruct counsel, as set out in paragraph 10(*b*) of the Charter, was breached.

C. *Legality of the inadmissibility report and the exclusion order*

[24] Paragraph 20(1)(*a*) of the IRPA reads as follows:

Obligation on entry	**Obligation à l'entrée au Canada**
20. (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,	**20**. (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :
(*a*) to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence; and	*a*) pour devenir un résident permanent, qu'il détient les visa ou autres documents réglementaires et vient s'y établir en permanence;
(*b*) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.	*b*) pour devenir un résident temporaire, qu'il détient les visa ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée.

[25] The applicant argues that the immigration officer's decisions regarding the exclusion order and the inadmissibility report are unreasonable because the immigration officer relied on erroneous facts and a mischaracterization of the applicant's situation when deciding that the applicant had breached the IRPA. Thus, the applicant said that the officer erred in his interpretation of subsection 20(1) of the IRPA because he said that the applicant initiated

procedures to obtain permanent or temporary resident status. In her affidavit, the applicant stated that she had never undertaken such steps.

[26] For its part, the respondent argues that neither the inadmissibility report nor the expulsion order was based on the fact that the applicant had initiated procedures to obtain permanent or temporary resident status, nor that the exclusion order was based on the fact that the applicant had provided truthful answers to the questions she was asked during her examination.

[27] The immigration officer did not err in his application of the IRPA. Subsection 20(1) of the IRPA is not ambiguous and stipulates that a foreign national who seeks to enter or remain in Canada must hold a visa or other required document:

> Subsection 20(1) requires foreign nationals who seek to enter or remain in Canada to possess a visa or other document.
>
> (*B010 v. Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87, at paragraph 98).

[28] With no evidence of the applicant having actually left Canada in February 2015 to return the same day, the immigration officer was correct in confirming that a breach had been committed and that the applicant was inadmissible within the meaning of subsection 44(1) of the IRPA. The applicant argues that the immigration officer relied on erroneous facts by stating that she had made an application for permanent residence in Canada. However, the applicant did not specify how this alleged error had a material impact on the officer's decision. It is important to recall that the reasonableness of a decision must be examined from the point of view of the outcome and the reasons; thus, this Court must examine the immigration officer's decision in its

entirety and determine whether, with regard to the facts and the law, the immigration officer's decision falls within a range of possible, acceptable outcomes:

> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at paragraph 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome. [My emphasis.]
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> (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, 2011 SCC 62, at paragraph 15)

V. Conclusion

[29] The Court is of the opinion that the immigration officer's decision indeed falls within the possible outcomes with regard to the law and the facts; consequently, the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed. There is no question of importance to certify.

OBITER

Based on the applicant's uncontradicted serious errors in judgment (see *Dong v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 1108, at paragraph 56), knowing that she has two children in Bermuda and also that she was never in any danger in Bermuda, but also taking into account her husband and child in Canada, she can still make an application for permanent residence in Canada, an application that she had not made in the past.

"Michel M.J. Shore"

judge

FEDERAL COURT

SOLICITORS OF RECORD

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