Federal Court  Cour fédérale

Date: 20160920

Docket: IMM-1400-16

Citation: 2016 FC 1058

Ottawa, Ontario, September 20, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

JOSE ANTONIO REYNOSA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA or the Act]. The Applicant seeks judicial review of a danger opinion [Opinion] of a Citizenship and Immigration Canada [CIC] Director of Case Determination, appointed as the Minister's Delegate [Delegate], wherein the Delegate found the

Applicant to be a danger to the Canadian public. I find this outcome to be unreasonable in light of the reasons provided below.

II. Facts

[2] The Applicant is a citizen of El Salvador. He came to Canada as a Convention Refugee in February 1989 and was granted permanent resident status in March 1989. The Applicant's immigration problems began in January 1994, when he was convicted of Unlawful Possession of a Narcotic for the Purpose of Trafficking.

[3] In October 1994, the Applicant was reported under s. 27 of the former *Immigration Act*, RSC 1985, c I-2, for serious criminality. As a result, a deportation order was issued against him in January 1996, which he appealed, to no avail.

[4] In November 1997, the Applicant was arrested by Immigration officials after he was charged for Uttering a Threat to Cause Death and Bodily Harm, against his spouse.

[5] Then, in April 1998, an arrest warrant was issued for the Respondent's failure to comply with the terms and conditions of his release. The warrant was executed by CIC Vancouver Enforcement in May 1998. He was released from custody on terms and conditions.

[6] Subsequently, in 2002, the Applicant pleaded guilty to the charge of Uttering a Threat, and received a suspended sentence and 18 months' probation.

[7] Despite these incidents and immigration proceedings, the Applicant was never removed from Canada.

[8] About a decade passed without any incident impacting the Applicant's immigration status. However, in August 2012, he was convicted for Failure to Provide the Necessaries of Life to his four-year-old son. He was sentenced to six months' imprisonment and two years' probation. This conviction prompted CBSA to ask the Minister to issue a danger opinion under paragraph 115(2)(a) of the Act.

[9] The Applicant provided submissions in his defence in March 2015. Nearly a year later, on February 15, 2016, the Delegate issued the Opinion nonetheless, finding that the Applicant was inadmissible on the basis of serious criminality. In particular, the Delegate found that the Applicant constituted a danger to the public due to accusations of him being violent toward vulnerable family members, and that he had a "cavalier attitude towards the law" (Opinion at p. 6). The Delegate did not believe the Applicant had been rehabilitated. The Delegate also found that on a balance of probabilities, the Applicant would not face risk to life, liberty or security of the person if he was returned to El Salvador, and there were no H&C considerations that warranted him remaining in Canada.

III. Issues and Analysis

[10] The Applicant contends first that the Delegate erred in determining that the 2012 conviction constituted serious criminality for the purposes of paragraph 36(1)(a) of the Act. Second, the Applicant contends that the Delegate erred by unreasonably overlooking key

evidence, namely a finding by the criminal court judge in the 2012 sentencing report, stating that the Applicant was not a danger to the public.

[11] The standard of review for a Minister's Delegate's findings in a danger opinion is reasonableness: *Omar v Canada (Citizenship and Immigration)*, 2013 FC 231 at para 33. The Delegate's findings are therefore entitled to a high degree of deference.

[12] I agree with the Applicant that the Delegate erred in law in determining that the Applicant is inadmissible on the grounds of serious criminality for his August 2012 conviction, because that conviction does not meet the criteria under paragraph 36(1)(a) of the Act. The Applicant was sentenced to six months' imprisonment, and not more, as required by the Act. Furthermore, the maximum punishment for the offence of Failure to Provide the Necessaries of Life is five years, and not at least ten, as required by the Act.

[13] I also agree with the Applicant that although he was previously found inadmissible for serious criminality as a result of his 1994 conviction, the Opinion provides insufficient information with respect to this 22 year old conviction, on which to base the danger finding.: The Delegate fails to provide any rationale for finding that the 1994 conviction and subsequent inadmissibility, satisfy the basis for the danger finding. For instance, the Delegate never discusses the drug trafficking conviction in the "Danger Assessment – Analysis" portion of the Opinion, and rather focuses entirely on the 2012 conviction, and related issues regarding violence against family members. The Delegate concludes the danger assessment with the following lines:

> These letters of support which speak of Mr. Reynosa's good behaviour and character do not change my opinion that Mr. Reynosa is a dangerous man who has a history of assault, serious threats and failure to provide care, all offenses directed against intimate family members [Opinion at p. 8, emphasis added]

[14] Aside from basing the danger finding on the recent convictions and incidents related to the family, the Delegate does not conduct any analysis of whether the 1994 conviction meets the requirements for a danger opinion.

[15] While the Respondent concedes that the 2012 conviction cannot alone support such an opinion, the Minister's counsel argues that the Delegate implicitly relied on the 1994 conviction in arriving at the Opinion, and the fact that the 1994 conviction was not explicitly addressed in the analysis was not fatal to the Opinion. For this proposition, the Respondent relies on *Pascale v Canada (MCI)*, 2011 FC 881 [*Pascale*], wherein a danger opinion was upheld even though the underlying conviction was overturned. Here, says the Respondent by analogy, the earlier (1994) conviction could have served as the basis for the Opinion.

[16] I cannot endorse the Respondent's argument. First, the consequences of a danger opinion – an exception to the principle of non-refoulement and thus a very serious finding under the Act -- require some degree of certainty in the Delegate's conclusions; the fact that they "could have" supported the danger finding, does not pass muster given its highly significant consequences.

[17] It should further be noted that *Pascale* differs from this case on its facts, because in *Pascale*, the danger opinion was based on two earlier convictions [see paras 47, 29]. Here, by contrast, it is far from clear that the Opinion was based on the Applicant's earlier criminality.

Although the 1994 drug offence was listed in the background recital, the Opinion's analysis section lacked any discussion of that offence. Certainly, drug trafficking does not fit within the Delegate's rationale excerpted above (re: offences and/or violence directed against family members). As already explained, the latter (2012) offence cannot alone support a danger finding.

[18] Finally, the Applicant argues that the Opinion is unreasonable in that it overlooked a key portion of the 2012 sentencing decision, which found the Applicant not to be a danger to the community. The Applicant contends that the Delegate had a duty to address the trial judge's analysis of risk to the public, given the context of the Opinion, and considering the importance of the principle of non-refoulement. Any exceptions to that principle should be applied restrictively: *Galvez Padilla v Canada (Minister of Citizenship and Immigation)*, 2013 FC 247 at para 26.

[19] I agree with the Applicant that where key evidence exists to counter a danger finding, the Delegate at minimum should have mentioned why it did not apply, or provide rationale to explain why s/he drew the opposite conclusion: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration) (1998)*, 157 FTR 35. Here, the evidence went unacknowledged.

[20] For the two reasons provided above, the matter will be returned for reconsideration by a different decision-maker, to the extent one is available.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted;

2. No questions were raised for certification, and none are certified; and

3. No costs are ordered.

"Alan S. Diner"

Judge

Annex "A"

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

36(1) Emportent interdiction de territoire pour grande criminalité les faits suivants:

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

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

Code criminel, LRC, 1985, ch C-46

215(2) Commet une infraction quiconque, ayant une obligation légale au sens du paragraphe (1), omet, sans excuse légitime, dont la preuve lui incombe, de remplir cette

Immigration and Refugee Protection Act, SC 2001, c 27

36(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) 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;

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 Minister, a danger to the public in Canada; or

Criminal Code, RSC, 1985, c C-46

215(2) Every one commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies on him, to perform that duty,

obligation, si:

a) à l’égard d’une obligation imposée par l’alinéa (1)a) ou b):

(i) ou bien la personne envers laquelle l’obligation doit être remplie se trouve dans le dénuement ou dans le besoin,

(ii) ou bien l’omission de remplir l’obligation met en danger la vie de la personne envers laquelle cette obligation doit être remplie, ou expose, ou est de nature à exposer, à un péril permanent la santé de cette personne;

b) à l’égard d’une obligation imposée par l’alinéa (1)c), l’omission de remplir l’obligation met en danger la vie de la personne envers laquelle cette obligation doit être remplie, ou cause, ou est de nature à causer, un tort permanent à la santé de cette personne.

(3) Quiconque commet une infraction visée au paragraphe (2) est coupable:

a) soit d’un acte criminel passible d’un emprisonnement maximal de cinq ans;

b) soit d’une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d’un emprisonnement maximal de dix-huit mois.

if

(a) with respect to a duty imposed by paragraph (1)(a) or (b),

(i) the person to whom the duty is owed is in destitute or necessitous circumstances, or

(ii) the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently; or

(b) with respect to a duty imposed by paragraph (1)(c), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.

(3) Everyone who commits an offence under subsection (2)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

FEDERAL COURT

SOLICITORS OF RECORD

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