Federal Court  Cour fédérale

**Date: 20170421**

**Docket: IMM-4370-16**

**Citation: 2017 FC 393**

**Ottawa, Ontario, April 21, 2017**

**PRESENT: The Honourable Madam Justice Strickland**

**BETWEEN:**

**BEYAN DUNOH CLARKE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of a Delegate of the Minister ("Minister's Delegate" or "Delegate") of Immigration, Refugees and Citizenship Canada ("IRCC") dated October 17, 2016 in which the Minister's Delegate refused the Applicant's request for reconsideration of the danger opinion written against him. This application is brought pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA").

**Background**

[2] The Applicant is a national of Liberia. His family fled Liberia in 1999 and resided in a refugee camp in Ghana until 2003 when they immigrated to Canada as Convention refugees, at which time the Applicant was 21 years old. In 2008 the Applicant pled guilty to manslaughter in connection with the beating and death of a two-year old boy who was the son of the Applicant's girlfriend. The Applicant was sentenced to 9 years in prison. In April 2010 the Applicant was found to be inadmissible for serious criminality pursuant to s 36(1)(a) of the IRPA and a deportation order was issued against him. However, because of his Convention refugee status, the Applicant could not be returned to Liberia unless the Minister made a determination that the Applicant constitutes a danger to the public in Canada pursuant to s 115(2)(a) of the IRPA. On May 3, 2011 the Minister made such a determination (the "Danger Opinion"). On July 20, 2012 this Court dismissed the Applicant's application for judicial review of the Danger Opinion.

[3] On October 10, 2013 the Applicant reached his statutory release date from prison. He was immediately placed in immigration detention by the Canada Border Service Agency ("CBSA"). On January 9, 2014 the Applicant was ordered released from immigration detention by a member of the Immigration Division of the Immigration and Refugee Board of Canada ("ID"). He then lived in the community on the conditions imposed by the ID including that he comply with statutory release conditions imposed by the National Parole Board. On July 28, 2016 the Applicant reached warrant expiry, meaning that his statutory release conditions were no longer applicable. On September 6, 2016 the Applicant was advised that he was scheduled to be removed from Canada on September 20, 2016. On September 14, 2016 the

Applicant requested a reconsideration of the Danger Opinion and deferral of his removal until that had occurred. CBSA forwarded the request for reconsideration to IRCC and cancelled the September 20, 2016 removal while awaiting a decision. On September 21, 2016 the IRCC refused to reopen the Danger Opinion. However, the Applicant was given 15 additional days to make further submissions as that decision was issued prior to receipt of further anticipated submissions from the Applicant's counsel. On October 17, 2016, after receipt and review of the further submissions, the IRCC issued a second decision and again refused to reopen the Danger Opinion. This is the judicial review of that decision.

[4] By motion filed on November 9, 2016 the Applicant sought a stay of his removal. While he raised a serious issue pertaining to the Minister's Delegate's treatment of the evidence he did not establish irreparable harm and the balance of convenience favoured the Respondent. Accordingly, by Order dated November 14, 2016, I denied the stay.

**Decision Under Review**

[5] The Minister's Delegate noted his or her prior decision of September 21, 2016 and stated that he or she had also reviewed the original Danger Opinion package and Danger Opinion. The Minister's Delegate then identified some of the new evidence submitted in support of the request that the Danger Opinion be reopened and reconsidered and stated that ENF 28, Chapter 7.16, "Reconsideration of danger opinion" (ENF 28 – Ministerial opinions on danger to the public, nature and severity of the acts committed and danger to the security of Canada ("Manual")) explicitly recognized the possibility that a danger opinion can be reopened and reconsidered based on new evidence or a breach of the principles of natural justice.

[6] The Minister's Delegate summarized the facts concerning the Applicant's criminal conviction. The Minister's Delegate then stated that at the time the Danger Opinion was written the Applicant was already incarcerated in a federal penitentiary for his crime and had already begun receiving and responding well to rehabilitative treatment. As such, the decision-maker rendering the May 2011 Danger Opinion would have been aware that the rehabilitative programming would continue until warrant expiry in July 2016. Therefore, the reports indicating the rehabilitative progress over the last 5 years could have been reasonably anticipated by that decision-maker. And, while the Applicant had not reoffended since his statutory release in September 2014, this was hardly surprising given the conditions of his release which included close monitoring and supervised visits with his daughter. The Minister's Delegate also cited a report dated April 19, 2016 that stated that the Applicant's current level of risk remains moderate and that he appears to have deficits in the areas of problem solving, emotion management and conflict resolution, which are exacerbated by stress.

[7] The Minister's Delegate stated that the removal of an individual after a danger opinion has been initiated and finalized may take several years, particularly where the client is still incarcerated at the time of the decision. Obtaining travel documents and litigation may also delay removal. Although detention may not always be maintained during such delays for a number of reasons, including by decisions of the ID on the basis that it is satisfied that the person does not pose an immediate danger to the public, this does not invalidate the Minister's Delegate's decision on danger to the public and "may reasonably be anticipated by the decision-maker in many cases – the present case among them".

[8] The Minister's Delegate found that the new evidence was not "particularly novel or of a nature which would not have reasonably been anticipated at the time" of the making of the Danger Opinion. As the new information was not "sufficiently novel" to justify reopening the Danger Opinion, the Minister's Delegate declined to reconsider the Danger Opinion and stated that it would continue to remain in effect.

**Issues and Standard of Review**

[9] The Applicant identifies the following issues:

1. Did the Minister's Delegate have the legal authority to set out a threshold requirement for consideration of new evidence?
2. Did the Minister's Delegate breach the duty of fairness owed to the Applicant by setting out a threshold requirement for consideration of new evidence when the threshold was not found in the Manual and the Applicant was not given notice that it would be imposed?
3. Is the decision perverse?

[10] In my view, this application can be determined on the basis of whether the decision is reasonable.

[11] The Applicant makes no clear submission on the standard of review. The Respondent submits that, in the absence of a legislative provision prescribing otherwise, a decision to reopen an administrative decision is discretionary and is therefore reviewable on the reasonableness standard *(Chopra v Canada (Attorney General)*, 2013 FC 644 at para 30 (aff'd in 2014 FCA 179, leave to appeal to the Supreme Court of Canada dismissed in 2015 CarswellNat 97 (WL)

("*Chopra*")); *Kurukkal v Canada (Citizenship and Immigration)*, 2010 FCA 230 at para 4 ("*Kurukkal*")).

[12] In the present matter the decision under review is the decision by the Minister's Delegate concerning the reopening and reconsidering of the Danger Opinion. The parties do not point to any prior jurisprudence that directly addresses the standard of review that would apply to such a decision. However, as noted by the Respondent, there is jurisprudence pertaining to other circumstances which holds that, in the absence of a legislative provision prescribing otherwise, a non-adjudicative body's decision to reopen a case is discretionary (*Chopra* at para 30; also see *Kurukkal* at para 4). In my view, in this matter the Court is also reviewing a discretionary decision which, therefore, attracts the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51 and 53).

**Submissions of the Parties**

*Applicant's Position*

[13] The Applicant submits that the Minister's Delegate erred in imposing a threshold which had to be met for new evidence before the evidence was considered to reopen and reconsider the Danger Opinion. The Manual requires that, where there is new evidence, the documentation must be forwarded to the Minister's delegate for review in which event the delegate "will reconsider" the original opinion. New evidence is defined as facts or evidence that were not available at the time of the original decision (e.g., a new correctional report or psychological report). The Applicant provided the very types of evidence that the Manual said would warrant

reconsideration but it was disregarded because of the imposition of an evidentiary threshold that the new evidence be "particularly novel" or "sufficiently novel" or "of a nature which would not have reasonably been anticipated at the time the decision-maker rendered her decision" before it would be considered. In this regard, the Minister's Delegate acted without legal authority, contrary to the Manual (*Nguyen v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 232 (FCA)), violated an implied legal duty and acted unreasonably.

[14] Further, it was procedurally unfair to impose on the Applicant more rigorous evidentiary standards than those prescribed in s 7.16 of the Manual before reopening the Danger Opinion. The Minister's Delegate's actions were in contravention of the factors to be considered in determining the content of the duty of fairness owed, as addressed in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. For example, the Applicant had a legitimate expectation that the Manual procedure would be followed (*Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429; *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 at paras 49-50). The Applicant also submits that he was given no notice that this new evidentiary threshold would be applied and was thereby prejudiced as he was denied an opportunity to respond to it.

[15] Further, even if the Delegate's new evidentiary standard is applied, the decision was perverse as the evidence submitted met that standard. For example, the evidence at the time of the Danger Opinion was that the Applicant did not have much contact with his daughter while the new evidence was that the relationship has become extremely important to the child. This change of events could not have been reasonably anticipated by the original decision-maker. It

was also perverse and arbitrary for the Minister's Delegate to adopt this threshold on the second request for reconsideration, when there was substantially more evidence in support of the request at that time, but not the first.

[16] The Applicant submits that the Minister's Delegate abdicated his or her responsibility as the Delegate should have considered whether the new submissions and evidence altered the original Danger Opinion, not whether it had the potential to do so. Further, the Minister's Delegate was required to consider the evidence cumulatively and as a whole but failed to do so because of his or her threshold perspective on the new evidence submitted.

*Respondent's Position*

[17] The Respondent submits that the Minister's Delegate did not act contrary to the Manual. Here, as stipulated by the Manual, the request for reconsideration was forwarded by CBSA to IRCC to determine if the request involved new evidence. IRCC made that determination and forwarded the material to the Minister's Delegate. The Minister's Delegate then reviewed the request to reopen. There is no statutory provision concerning the reconsideration of a danger opinion and this Court has confirmed that the Minister is entitled to ignore the request altogether (*McLaren v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 373 (FCTD) at para 12 ("*McLaren*")). The Applicant's submission that the Minister's Delegate acted in violation of the law by applying the evidentiary standard that he or she did ignores the fact that there is no law to violate. Further, the mere submission of new evidence does not automatically warrant a reopening of a valid danger opinion as no danger opinion would ever be final in that case. Rather, the Minister's Delegate is to determine whether the new evidence warrants a full

reopening of a danger opinion. In conducting that review the Minister's Delegate was entitled to consider the substance of the evidence.

[18] The Respondent submits that there was no breach of procedural fairness. The Minister's Delegate's "review" was not constrained by the Manual. The Minister's Delegate must be permitted to consider the probative value, relevance and general strength of the evidence to determine if the evidence warrants reopening of the Danger Opinion. And, even if the Manual was not followed, this does not amount to a breach of procedural fairness as manuals and policies are not binding on either the government or the Courts (*Shabdeen v Canada (Citizenship and Immigration)*, 2014 FC 303 at para 16 ("*Shabdeen*")). Nor was there a breach of procedural fairness due to a lack of notice. The Applicant was aware of how his request would be assessed based on the prior, September 21, 2016 decision. There the Minister's Delegate engaged in a detailed analysis of the persuasiveness and relevance of the new evidence noting that similar information was before the decision-maker in 2011. Thus the Applicant knew the sort of analysis that would be applied and had an opportunity to and did make further submissions.

[19] The Respondent submits that the decision was not perverse and, considered as a whole, was reasonable. The decision-maker must do more than look at the new submissions in a vacuum and reopen the decision if there is some new and unanticipated evidence. It is reasonable for the decision-maker to assess the extent to which the new submissions and evidence has the potential to alter the original decision. The Respondent submits that this is exactly what was done in this case and it was done reasonably. It is reasonable to believe that the evidence regarding the Applicant's developing relationship with his daughter is not

substantive or meaningful evidence that would realistically change the Danger Opinion. The Minister's Delegate had regard to all the evidence, considered the larger context on which the Danger Opinion was based, including that the Applicant's current level of risk of reoffending remains moderate, and reached a defensible decision.

*Analysis*

[20] As pointed out by the Applicant, unlike s 110(4) of the IRPA which states that on appeal to the Refugee Appeal Division only evidence that arose after the rejection of an applicant's claim, or was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented at the time of the rejection is admissible, or, s 113(a) which similarly addresses the admissibility of new evidence in the context of a Pre-Removal Risk Assessment ("PRRA"), there is no legislative provision in the IRPA concerning the admissibility of new evidence when a request for reconsideration of a Danger Opinion is made. Nor does the IRPA or any related regulation prescribe the grounds upon which a danger opinion may be reconsidered.

[21] Here, there is no legislative provision to interpret. There are, however, ministerial guidelines in the form of the Manual. And, while it is well established by the jurisprudence that guidelines are of no legal force and are not binding on the Minister or her agents, this Court has previously held that they are of assistance in assessing whether a decision was an unreasonable exercise of discretion conferred (*Budakh v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 363 at para 26; *Shabdeen* at para 16; also see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 31-32).

[22] In this matter, s 7.16 of the Manual states:

> **7.16 Reconsideration of danger opinion**
>
> **Note:** Requests for reconsideration will not stay the processing of a case, including removal.
>
> If the person concerned or their counsel disagrees with the decision but does not submit any other evidence to support their case, the subject of the decision or their counsel should be advised in writing that the opinion has already been issued and continues to be in effect.
>
> Requests for reconsideration of a danger opinion should be handled by the local CBSA office, who will provide input and forward the request to IRCC's Case Management Branch, where a decision maker will consider whether the request meets either of the following criteria:
>
> · **New evidence**
>
> Where a request is made to consider facts or evidence that were not available at the time of the original decision (e.g., a new correctional report or psychological report), the documentation must be forwarded to the Minister's delegate for review.
>
> · **Principle of natural justice**
>
> Where the person or their counsel alleges that the decision violated a principle of natural justice, the case should be sent to the Minister's delegate for reconsideration.
>
> If either of these criteria is met, the decision maker will reconsider the original opinion.

[23] In my view, in the face of legislative silence as to the criteria for the admissibility of evidence when a request for reconsideration is made, what remains is the question of whether the Minister's Delegate reasonably exercised his or her discretion in the circumstances. The exercise of that discretion must be viewed in the context of the guidance provided by the Manual and the form of the new evidence submitted in support of the request for reconsideration.

[24] In this case, in his October 12, 2016 submissions, the Applicant presented new evidence that was not, with one exception, before the original decision-maker who made the Danger Opinion and was also not before the Minister's Delegate when he or she made the September 21, 2016 decision refusing to reopen and reconsider the Danger Opinion. That evidence included the transcripts of the Applicant's detention review hearings dated January 9, 2014 and September 22, 2014, Correction Service Canada Psychological/Psychiatric Assessments report dated July 4, 2016 and June 2, 2010, thirteen other Correctional Service Canada reports as well as various letters of support. The Manual explicitly contemplates new correctional reports and psychological reports as new evidence in the reconsideration of a danger opinion.

[25] The October 12, 2016 submissions of the Applicant's counsel and the accompanying new evidence were submitted to CBSA. The Manual indicates that CBSA was to provide input and forward the request to IRCC's Case Management Branch, where a decision-maker would consider whether the request met either of the criteria, in this case whether the request was to consider facts or evidence that were not available at the time of the original decision. It is not apparent from the record if this second step was completed but it is clear that the submissions and new evidence were forwarded to a delegate. In the decision, the Minister's Delegate notes that the Applicant has submitted new evidence post-dating the original May 2011 Danger Opinion including the detention review transcripts, a letter from the mother of his daughter, a letter from his daughter herself and many Correctional Service Canada reports from 2008, 2010, 2012, 2013, 2015 and 2016.

[26] Thus, to this extent the process set out in the Manual was followed. The Applicant submits, however, that the Manual states that if either of the natural justice or new evidence criteria are met, then the decision-maker "will reconsider the original opinion" but the Delegate failed to do so. It is correct that in this matter there was new evidence but, because the Delegate found it to be not "particularly novel", "sufficiently novel" or "of a nature which would not have reasonably been anticipated" at the time of the making of the Danger Opinion, the Delegate decided that the evidence did not justify the reopening of the Danger Opinion.

[27] As noted above, the Manual is not binding and acts merely as a guideline. Thus, failure to comply with it and to reopen and reconsider the Danger Opinion when new evidence has been submitted is, in and of itself, perhaps not a fatal error. As stated in *Gilani v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 152:

> [16] The Guidelines contain a list of questions which the Program Manager "must address" as part of her risk assessment. The Applicant submitted that the visa officer restricted her analysis to the issue of excessive demand on the Canadian health care system and did not address the other questions set out in the Guidelines.
>
> [17] In *Cheng v. Canada (Secretary of State)*, [1994] F.C.J. No. 1318 (T.D.)(QL), Cullen J. held, at paragraph 7, that while the Guidelines were not legislative in nature, "they ought to be followed by an Immigration Officer in making a decision so that some consistency is achieved within the department". However, Cullen J. held that the failure of an immigration officer to follow the policy expressed in these Guidelines was not an error worthy of referring the matter back for redetermination (see also *Vidal, supra*). Cullen J. allowed the application for judicial review in *Cheng, supra* for other reasons.
>
> [18] In *Ramoutar, supra*, Rothstein J., as he then was, elaborated at page 375 on the status of the policy contained in the Immigration Manuals stating that "merely because officials at the Department of Immigration have set forth a policy does not confer upon that policy the status of law."

> [19] As a result, the failure of the Program Manager to follow the Guidelines, in and of itself, would not be reviewable error.

[28] It should perhaps also be clarified that the Delegate did not conduct a reconsideration. Rather, the Delegate implemented an intermediate step by which he or she assessed the evidence and found it to be insufficient to support the reopening of the Danger Opinion for reconsideration. Thus, the decision before me concerns the refusal to reopen the Danger Opinion; it is not a challenge to a reconsideration of that opinion.

[29] The refusal was made on the basis that the new evidence was not "particularly novel", "sufficiently novel" or that it could have "reasonably been anticipated" at the time the Danger Opinion was made. In this regard the Delegate stated that at the time the Danger Opinion was written against the Applicant he was already incarcerated in a federal penitentiary for his crime and had already begun receiving and responding well to rehabilitative programming which would continue until his warrant expiry date of July 28, 2016. The Delegate stated that "[T]he reports which indicate he has continued to make rehabilitative progress in the last 5 years could therefore have been reasonably anticipated by the decision-maker". Further, the removal of an individual after a danger opinion has been initiated and finalized may take several years, particularly where the client is still incarcerated at the time of the decision and the obtaining of a travel document or permissions from countries of transit or litigation may also delay removal. During such delays detention is not always maintained for a number of reasons, including decisions of ID members to release the individual where they are satisfied the subject does not pose an immediate danger to the public. Indefinite detention pending removal is not ideal for either the CBSA or the individual. However, such decisions do not invalidate the

Delegate's decision on danger to the public, "and may reasonably be anticipated by the decision-maker in many cases - the present case among them".

[30] The Respondent submits that the Delegate's approach was reasonable because the Delegate was entitled, as a general principal, to assess the probative value or relevance of the submitted evidence to determine if it is "new" and that the "review", as referenced in the Manual, is to determine whether the new evidence warrants a "full re-opening" of the danger opinion, not whether any evidence exists which did not exist at the time the Danger Opinion was made. Otherwise no danger opinion would ever be final as endless requests for reconsideration could be made.

[31] I would first note that the Manual does not prescribe an intermediate step of this nature nor does it support the Respondent's interpretation of the process it does describe. The Manual describes a process where, when the criteria for new evidence is met, the evidence must be forwarded to a Minister's delegate for review whereupon the delegate "will reconsider" the original opinion. Nothing in the IRPA, the regulations or the Manual suggests that the Delegate has the discretion to vary the process set out in the Manual or, as an exercise of his or her discretion, identify and impose an evidentiary criteria other than that specified. Rather, the existence of the procedure set out in the Manual suggests that delegates will be guided by its content when exercising their discretion.

[32] The Respondent relies on *McLaren* for the proposition that no error arises from the Minister's Delegate's imposition of his or her evidentiary requirement before reopening the

Danger Opinion because the Minister's Delegate was entitled to ignore the request altogether. I am not convinced that *McLaren* stands for that proposition. There Justice Simpson stated that as there was no statutory provision for the reconsideration of a danger opinion, from a strict legal perspective, the respondent was entitled to ignore the request for reconsideration. However, that a minimal explanation for the decision had not been provided which was in breach of the duty of fairness. Moreover, I note that *McLaren* was decided in 2001 and no reference was made to the Manual in the decision. In that matter Justice Simpson also found that there was no applicable statute and there was no basis for a legitimate expectation that any particular procedure would be followed. This would suggest that the Manual was not in effect at that time.

[33] Given the existence of the Manual and the new evidence submitted in this matter, I am not convinced that the Minister's Delegate was entitled to ignore the Applicant's request. The Minister's Delegate was required to reasonably exercise his or her discretion, and simply ignoring a request for reconsideration in these circumstances would not, in my view, be reasonable. I am also not persuaded that *McLaren* supports the Delegate's treatment of the new evidence in these circumstances as suggested by the Respondent.

[34] That said, the Respondent raises a valid concern for potential abuse, for example, if each time a correctional service report were issued, which could be monthly, an Applicant sought a reconsideration. This concern may speak to a gap in the content of the Manual or highlight a lack of clarity in its provisions. And, while the criteria of newness, relevance, credibility and materiality may well be representative of a general principle in assessing the admissibility of new evidence, as the Respondent submits, the Manual does not indicate that a delegate may consider that

principle in a preliminary assessment of the evidence which otherwise meets the specified criteria for new evidence to reopen the danger opinion. Nor does the Respondent provide any jurisprudence in support of the application of the general principle in these circumstances.

[35] In any event, in this specific case, this concern has no bearing on the analysis of the reasonableness of the decision. Here the Applicant made the request after he had completed his sentence and had been released on specified conditions. It also appears from the record that there was agreement between CBSA and the Applicant's counsel that, subsequent to the September 21, 2016 decision, further submissions could be made and that they would be considered and a new decision rendered.

[36] In my view, in this case the Delegate's decision is unreasonable because of the reasoning upon which it is premised. The Manual explicitly references "new correctional reports or psychological reports" in the context of new evidence that would meet the necessary criteria for a reconsideration. The Applicant provided both, yet the Delegate found that this evidence could have been reasonably anticipated in 2011 by the decision-maker who rendered the Danger Opinion and, therefore, was not sufficiently novel for the purposes of reconsidering that opinion. First, this directly contradicts the approach set out in the Manual. While the Manual is not binding, it does provide guidance to the Delegate and specifically identified this type of evidence as supporting a request for reconsideration. Because this type of evidence was explicitly identified as an example of new evidence not available at the time of the original decision, it would logically be, and was, anticipated. It therefore cannot reasonably be excluded on that basis.

[37] Second, this is speculative reasoning. The Delegate states that the original decision-maker would have been aware that the Applicant was responding well to rehabilitative programming and that this would continue until his warrant expiry date. Therefore, it could reasonably have been anticipated by that decision-maker in 2011 that such positive progress would continue over the next five years. On that basis, the reports were anticipated and added no novel evidence. This assumes, however, that the Applicant would continue to participate in programming, would continue over the next five years to make progress but that this progress would not exceed the level achieved in 2011 and that nothing in the new reports would otherwise positively (or negatively) address the original concerns.

[38] Moreover, it is perverse that while the Manual identifies new correctional reports as new evidence warranting a reconsideration of a danger opinion, the Delegate dismisses that evidence and refuses to reconsider the opinion on the basis that such reports are anticipated.

[39] In this regard I would note that the Delegate makes no reference to the most recent psychological/psychiatric report of Correctional Service Canada which is dated July 4, 2016. Amongst other things, this addresses the Applicant's acknowledgement of the seriousness of the offence and his expression of remorse, which appears to be a change from the psychological intake assessment, dated June 9, 2009, referred to in the Danger Opinion which suggested that the Applicant denied and minimized his involvement in the death of the child. It is difficult to see the basis upon which this change of view was anticipated by the original decision-maker. The most recent psychological/psychiatric report also addresses the Applicant's employment upon release, which again, is not addressed in the original Danger Opinion. Moreover, the

psychologist stated that the Applicant had made very good use of therapy resources available to him and that he appeared to have made some very substantial gains in understanding and resolving some difficult life experiences and in improving his emotional functioning and overall coping, as well as substantially changing his views on what constitutes appropriate parenting and disciplinary tactics with children. It is again difficult to see how such specific findings are covered by the anticipatory approach to the evidence adopted by the Minister's Delegate.

[40] The Minister's Delegate also based his or her decision on the finding that, although detention may not always be maintained, including as a result of decisions of the ID on the basis that it is satisfied that the person does not pose an immediate danger to the public, this does not invalidate the Delegate's decision on danger to the public and "may reasonably be anticipated by the decision-maker in many cases – the present case among them". However, nothing in the Danger Opinion suggests that this was anticipated by the original decision-maker. And, while the changed circumstances of the Applicant's relationship with his daughter may alone, as the Respondent submits, not suffice to vary the Danger Opinion, the Delegate was required to make that determination.

[41] The Minister's Delegate also cited a report of the Parole Board of Canada dated April 19, 2016 which stated that the Applicant's current level of risk remains moderate. This is correct, however, in my view the report must be considered in whole and in the context of all of the new evidence which was unreasonably discounted on the basis that it could have been anticipated.

[42] In the result, this application for judicial review must be allowed because the Minister's Delegate unreasonably exercised his or her discretion and erred by dismissing the new evidence on the basis that it could have been reasonably anticipated by the original decision-maker in 2011 at the time when the Danger Opinion was rendered.

**Certified question**

[43] The Applicant submits the following question for certification:

> In light of the Immigration Manual statement (ENF 28 section 7.16)
>
> > "Where a request is made to consider facts or evidence that were not available at the time of the original decision… the decision maker will reconsider the original [public danger] opinion",
>
> does the duty of fairness require that,
>
> > a) where a request is made to consider facts or evidence that were not available at the time of the original decision, the decision maker must reconsider the original public danger opinion, or
> >
> > b) if a threshold requirement must be met before the reconsideration is engaged, the requester must be notified of that threshold test and given an opportunity to meet it?

[44] Pursuant to s 74(d) of the IRPA, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question. The test to be applied when considering whether a question is suitable for certification is set out in *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168:

> [9] It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, 176 N.R. 4, 51 A.C.W.S. (3d) 910 (F.C.A.) at paragraph 4; *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368 (C.A.) at paragraphs 11-12; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129 at paragraphs 28, 29 and 32).

(Also see *Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145 at paras 28-30; *Canada (Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 11).

[45] The Federal Court of Appeal in *Liyanagamage v Canada (Secretary of State)*, [1994] FCJ No 1637 (FCA) at paras 4-6 also stated that the certification process is not to be used as a tool to obtain from that Court declaratory judgments on fine questions which need not be decided in order to dispose of the case nor is it to be equated with the references process established by the *Federal Courts Act*, RSC, 1985, c F-7.

[46] In this matter, there are several reasons why the proposed question is not appropriate for certification. First, the question need not be decided in order to dispose of this matter as I have determined that the decision should be set aside on the basis of an unreasonable exercise of discretion. Second and relatedly, I have not dealt with the issue of procedural fairness in this decision as it was not necessary to do so. Finally, I am not persuaded that the proposed question transcends the interests of the immediate parties to the litigation, as well as contemplates an issue

of broad significance or general importance. Accordingly, I decline to certify the proposed question.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is granted. The decision of the Minister's Delegate is set aside and the matter is remitted for redetermination by a different Delegate;
2. No question is certified; and
3. There will be no order as to costs.

"Cecily Y. Strickland"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4370-16 |
| **STYLE OF CAUSE:** | BEYAN DUNOH CLARKE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | WINNIPEG, MANITOBA |
| **DATE OF HEARING:** | APRIL 3, 2017 |
| **JUDGMENT AND REASONS:** | STRICKLAND, J. |
| **DATED:** | APRIL 21, 2017 |

**APPEARANCES:**

| | |
|---|---|
| David Matas | FOR THE APPLICANT |
| Aliyah Rahaman | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| David Matas<br>Barrister and Solicitor<br>Winnipeg, Manitoba | FOR THE APPLICANT |
| William F. Pentney<br>Deputy Attorney General of Canada<br>Winnipeg, Manitoba | FOR THE RESPONDENT |