Federal Court  Cour fédérale

Date: 20170613

Docket: IMM-4862-16

Citation: 2017 FC 587

Ottawa, Ontario, June 13, 2017

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

REZARTI UJKAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Call it natural justice; call it procedural fairness; call it the Rule of Law; call it what you will. In this country, a person whose rights may be affected by a decision of a court or an administrative tribunal must be given a fair opportunity to present his or her case, or defence. Mr. Ujkaj, a Canadian permanent resident, has been ordered deported back to Albania for having been convicted in Canada of serious criminality. That order is under suspensive condition

because Mr. Ujkaj is also a refugee. Section 115 of the *Immigration and Refugee Protection Act* (*IRPA*) sets out the principle of *non-refoulement*:

> A refugee shall not be returned to a country where he will be at risk of persecution or torture or cruel and unusual punishment unless, in the case of serious criminality, he is, in the opinion of the Minister, a danger to the public in Canada.

No such danger opinion has been issued to date.

[2] Mr. Ujkaj's complaint is that the deportation order was issued before he had a fair opportunity to meet with his lawyer and to instruct him with respect to the inadmissibility hearing. His lawyer's request for a postponement was denied.

[3] An Officer had prepared an inadmissibility report under s.44 of *IRPA* on the grounds that he had been convicted in November 2015 of aggravated assault contrary to s.268 of the *Criminal Code*, and was convicted again in April 2016 of the offences of possession for the purpose of trafficking controlled substances, namely cocaine and MDMA, both contrary to s.5(2) of the *Controlled Drugs and Substances Act*.

[4] The Minister's Delegate, being of the opinion that the report was well founded, referred the report to the Immigration Division of the Immigration and Refugee Board for an admissibility hearing.

[5] Mr. Ujkaj, who at the time was incarcerated at Collins Bay Penitentiary in Kingston, was given a notice on September 15, 2016, to appear before the Immigration Division at Collins Bay

on October 14th for the purpose of an admissibility hearing. The case against him had already been disclosed to him on or about August 8, 2016.

[6] Mr. Ujkaj only retained Toronto counsel on October 7, 2016. Counsel stated he was unavailable on October 14th, requested a postponement and proposed various dates in November, including November 9th and 10th. The Immigration Division acquiesced and set the matter down for November 9th. However, counsel then said he was no longer available that day. The hearing was rescheduled for November 10th. Counsel said he did not want to proceed that day as he had not yet met face to face with his client. His request for another postponement was refused. Counsel appeared by telephone at the hearing, still complaining. A further disclosure was made at the hearing, and he was only given 30 minutes to digest this information.

Analysis

[7] Mr. Ujkaj's best arguable case is that he was denied natural justice. As Mr. Justice Le Dain stated in *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at pp 660 and 661:

> Certainly a failure to afford a fair hearing, which is the very essence of the duty to act fairly, can never of itself be regarded as not of "sufficient substance" unless it be because of its [page 661] perceived effect on the result or, in other words, the actual prejudice caused by it. If this be a correct view of the implications of the approach of the majority of the British Columbia Court of Appeal to the issue of procedural fairness in this case, I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of

> speculation as to what the result might have been had there been a hearing. [my emphasis]

[8] However, there are instances where a lack of procedural fairness can make no difference at all (see *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202; *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126; *Gennai v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 8; and *Correia v Canada (Minister of Citizenship and Immigration)*, 2004 FC 782).

[9] What defence was Mr Ujkaj deprived of making? The hearing was limited to his status (citizen, permanent resident, or visitor) and his criminal record. Once those facts were established, s.45 of *IRPA* required the Immigration Division to make the applicable removal order, which it did.

[10] If Mr Ujkaj had been denied the opportunity to make his defence, he as entitled to bring that defence before this Court. Although the general principle is that judicial review is based on the material before the original decision-maker, there are exceptions, one of which relates to natural justice and procedural fairness (*Bernard v Canada (Revenue Agency*), 2015 FCA 263; and *Chin Quee v Teamsters Local #938*, 2017 FCA 62).

[11] Counsel submitted that it would be outright speculation to suggest what a possible defence might have been. At most, he said he might have, but has not, retained criminal counsel who may have challenged the convictions. This Court could not contemplate a collateral attack

on the convictions (*Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77). If there had been a challenge to the convictions, at best a stay could have been sought.

[12] No case has been put forward that Mr. Ujkaj is not a permanent resident. No case has been put forward of mistaken identity. No case has been put forward at all. As Mr. Justice Phelan said in *Correia*, above, at para 36:

> This is one of those rare cases where there was a breach of procedural fairness but where the remedy should not be the quashing of the decision. The Applicant was unable to suggest what relevant facts could have been put to the Delegate which could have in any way altered the decision to refer. There is no purpose to be served in repeating the process to end at the same result. It is unfair to both parties to order a repeat of the removal process. To do so would be a triumph of form over substance.

[13] In any event, there was no breach of natural justice or procedural fairness. Disclosure had been made to Mr. Ujkaj who had not passed on that information to counsel. Counsel had over a month to travel from Toronto to Kingston in order to have a proper interview.

[14] Counsel queried why even bother to have an inadmissibility hearing. Although, in the context of this case, the hearing had to be extremely limited, there are other instances in which the hearing might be quite complex, such as a report written up with respect to medical inadmissibility.

JUDGMENT

For reasons given, this application for judicial review is dismissed. There is no question to certify for the Federal Court of Appeal.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4862-16
STYLE OF CAUSE:	REZARTI UJKAJ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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