Federal Court  Cour fédérale

Date: 20180108

Docket: IMM-260-17
IMM-261-17
IMM-262-17

Citation: 2018 FC 10

Montréal, Quebec, January 8, 2018

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

PEDRO GONZALES

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The applicant has brought three applications for judicial review challenging:

1. Federal Court file no. IMM-261-17: The decision dated May 13, 2016 of a Canada Border Services Agency's officer (the CBSA) to issue a report under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] alleging that the

applicant is inadmissible to Canada for serious criminality pursuant to section 36 of the *IRPA* (the Decision to Report);

2. Federal Court file no. IMM-260-17: The decision of a Minister's delegate dated June 6, 2016 referring the applicant to an admissibility hearing under subsection 44(2) of the *IRPA* (the Referral Decision); and
3. Federal Court file no. IMM-262-17: The decision of a member of the Immigration and Refugee Board of Canada (IRB) dated September 27, 2016 to issue a deportation order against the applicant (the Removal Decision).

[2] The parties agree that the success or failure of the challenge to the Removal Decision will turn on the success or failure of the judicial review applications concerning the Decision to Report and the Referral Decision.

II. Facts

[3] The applicant, Pedro Freddie Gonzales, is a 53 year old citizen of the Philippines. He entered Canada on May 25, 1979, as a permanent resident with his grandmother at the age of 15. He had been adopted by his grandmother at the age of 6 months, as his mother had him when she was just 16 years old.

[4] The applicant has two children aged 15 and 31 – his minor child (Kaylan) provided a support letter in relation to the inadmissibility proceeding against the applicant. The applicant has been in a common law relationship with Nona Bridgman since 2001. The two have operated

a business under the name “K & N Exotic Fish” for over 10 years. Ms. Bridgman also provided a support letter.

[5] The applicant has a record of criminal convictions mainly in the period between 1986 and 1994. In 1986, he was convicted of (i) theft under $1,000, for which he was given a conditional discharge and probation; and (ii) possession of a narcotic, for which he was given an absolute discharge. Later the same year, he was convicted of possession of a weapon and sentenced to one day in custody. In 1987, he was convicted again of theft under $1,000, for which he was fined. In 1989, he was convicted of credit card fraud and fined. In 1990, he was convicted of double doctoring and fined. Later the same year, he was convicted again of possession of a weapon. This time he was fined. In 1994, he was convicted of fraud over $1,000 and personation and given a two-year suspended sentence. In 1998, he was convicted of possession of a scheduled substance and fined. In 2013, he was convicted of failing to comply with a recognizance and, following 24 days of pre-trial custody, sentenced to one additional day in custody.

[6] On April 4, 2015, the applicant was convicted of possession of a prohibited or restricted firearm with ready access to ammunition (the Index Offence) contrary to section 95 of the *Criminal Code of Canada*, RSC 1985, c C-46. On June 4, 2015, he was sentenced to about 29 ½ months in jail. The firearm in question was a .45 caliber handgun with an obliterated serial number. At the time of his arrest for this crime, the police also seized the following items from his residence: ammunition, pellet guns, four grams of marijuana, half an ounce of cocaine, a scale, a cell phone, and packaging material.

[7] The applicant served his time at the Stoney Mountain Institution, outside of Winnipeg, Manitoba, in a minimum security unit. He applied for parole but was denied in September 2015.

[8] On January 26, 2016, the applicant was interviewed by the CBSA for the purpose of determining whether he was inadmissible to Canada on grounds of serious criminality. By letter dated March 31, 2016, the CBSA informed the applicant of the inadmissibility proceeding being undertaken against him and provided him with the opportunity to make written submissions thereon. The applicant made such submissions, and several members of his family and friends submitted support letters.

III. Impugned Decisions

A. *First Decision: Decision to Report*

[9] The applicant was reported as inadmissible to Canada pursuant to paragraph 44(1) of the *IRPA* by Officer Jennifer Genovey in a letter to the Minister of Citizenship and Immigration dated May 13, 2016.

[10] Reasons in support of the Decision to Report were prepared in the form of an A44 Narrative Report dated May 17, 2016 (the Narrative Report) which was addressed to Acting Manager Chuck Desjarlais. The Narrative Report includes sections addressing (i) the applicant's relatives (both inside and outside Canada); (ii) his reportable convictions; (iii) the circumstances of the allegation(s) of inadmissibility; (iv) the applicant's degree of establishment in Canada; (v) humanitarian and compassionate factors; and (vi) the applicant's potential for rehabilitation. The

Narrative Report ends with a recommendation that the applicant be sent to an admissibility hearing and that a deportation order be issued. The Decision to Report also indicates that the case should be referred to a "Manager for Long Term Permanent Resident".

[11] As regards the applicant's relatives, the Narrative Report notes his two children in Canada, one of whom is a minor, and a common law spouse (Ms. Bridgman). He also has a cousin in Canada. The Narrative Report also indicates that the applicant has a mother and four brothers in the Philippines.

[12] The Narrative Report details the circumstances surrounding the applicant's arrests related to his convictions in 1989, 1990, 1994 and 2015.

[13] The Degree of Establishment section of the Narrative Report notes that the applicant came to Canada at the age of 15. It also notes the applicant's long term relationship with Ms. Bridgman, but indicates that the exact nature of that relationship is unknown because both the applicant and Ms. Bridgman have been evasive about it. This section also notes that their business struggled during the applicant's incarceration and has since closed.

[14] The Humanitarian and Compassionate Factors section of the Narrative Report considers that the applicant has a small support network in Canada, but that he tends to gravitate toward negative associates and the drug culture when times are stressful. This section also notes that, though the applicant had no convictions for a significant period, he admits that he was dealing drugs for financial gain during some of that time. This section repeats that the applicant has his

mother and brothers in the Philippines, and states that he would have support if returned there. This section ends with a brief discussion of the best interests of the applicant's minor child.

[15] The Potential for Rehabilitation section notes that the applicant is listed as a medium risk to reoffend by Corrections Services Canada (CSC), and that he gravitates toward negative associates and the drug trade for financial gain during stressful times. Though he admits his guilt for the Index Offence, he portrays himself as a victim. This section also includes the following extract from an assessment for decision from CSC that arose from the applicant's 2015 parole application (the Assessment for Decision):

> A review of the Offence Cycle indicates that [the applicant] is quite comfortable with the criminal lifestyle. He associates with criminalized peers and actively participates in criminal activities for monetary gain. He has a lengthy criminal history and consistently distorts his thinking and presents as a victim stance. It is really unclear if [the applicant] has any insight into his offence cycle. He has a compromised value system and has committed fraud against his own family supports. He is deceptive around his personal situation and intimate relationships.

B. *Second Decision: Referral Decision*

[16] The Referral Decision is found in a one page form that was signed by Acting Manager Bradley James-Thiessen, a CBSA Enforcement Officer, on June 6, 2016. On the same day, Officer James-Thiessen also signed the Narrative Report in the section entitled "Decision of the Minister's Delegate" indicating that the matter should be referred for an admissibility hearing.

C. *Third Decision: Removal Decision*

[17] The Removal Decision is provided in the form of a transcript of part of a hearing before IRB member Michael McPhalen on September 27, 2016. The transcript notes the conviction for the Index Offence as well as the sentence. Member McPhalen indicates that the law requires a deportation order. He signed such an order the same day.

IV. Issues

[18] The issues raised by the applicant fall into two categories: (i) those related to the procedural fairness of the process that led to the impugned decisions; and (ii) those related to errors in those decisions.

[19] The applicant's arguments concerning procedural fairness can be identified as follows:

1. Whether the proper procedures for considering the inadmissibility of a long term permanent resident were respected;
2. Whether the failure to provide the applicant a copy of either the Narrative Report or the Assessment for Decision quoted therein constituted a breach of procedural fairness; and
3. Whether the failure to alert the applicant to the fact that CSC documents such as the Assessment for Decision would be considered in the inadmissibility process constituted a breach of procedural fairness.

[20] The errors the applicant argues are present in the impugned decisions can be identified as follows:

1. The failure to recognize that the Index Offence was an aberration after a lengthy period without a conviction;
2. The failure to consider a job offer made to the applicant; and
3. Reliance on a quote from the Assessment for Decision that is not representative of the applicant's situation.

V. Analysis

A. *Standard of review*

[21] The parties do not appear to disagree on the issue of standard of review. Procedural fairness is reviewed on a standard of correctness and the alleged errors in the impugned decisions are reviewed on a standard of reasonableness: *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 at para 15 [*Sharma*].

B. *Procedural Fairness Issues*

(1) Procedures for Considering Inadmissibility of a Long Term Permanent Resident

[22] The applicant notes the following about the Narrative Report:

1. It is addressed to Acting Manager Desjarlais;
2. It recommends that the case be referred to a Manager for Long Term Permanent Resident; and
3. In her recommendations, Officer Genovey did not tick the box for review by a Minster's delegate.

[23] As it turns out, Acting Manager Desjarlais does not appear to have had any role in the Referral Decision. As indicated above, that decision was made by another manager, Acting Manager James-Thiessen.

[24] The applicant argues that the procedures followed to assess inadmissibility in this case were inappropriate because he is a long term permanent resident. The applicant notes that these procedures are set out in Immigration Manual ENF 6: Review of reports under subsection A44(1) (Immigration Manual ENF 6), which provides at section 19.3 that receiving a report of inadmissibility and referring it for an admissibility hearing are to be done "at the Manager or Director level in the regions."

[25] The applicant notes that, in the present case, no additional procedure was taken to reflect the fact that he is a long term permanent resident. The applicant argues that if Officer James-Thiessen was conducting the required regional review at the Manager or Director level, then there is no indication that any delegate of the Minister properly referred the case to an admissibility hearing.

[26] In response, the respondent argues that there is no requirement that the managerial review be separate from the review by the Minister's delegate. No such separate review is contemplated either in the *IRPA* or in any regulations or policies thereunder. The respondent argues that Immigration Manual ENF 6 dictates the level of review for long term permanent residents but does not provide for an additional step.

[27] I agree with the respondent. The evidence shows that the Decision to Report was reviewed by Officer James-Thiessen and that he was properly delegated to conduct that review. The fact that the Narrative Report was originally addressed to a different manager is not of concern. In addition, Officer James-Thiessen acted as the Minister's Delegate as clearly indicated on the one-page form he signed on June 6, 2016. The fact that the managerial-level reviewer and the Minister's Delegate were one and the same person does not fall afoul of the procedures contemplated in an inadmissibility process, even for a long term permanent resident.

[28] The applicant's concern that no particular attention was paid to the fact that the applicant was a long term permanent resident is contradicted by the various references thereto in the Narrative Report.

(2) Failure to Provide the Narrative Report or the Assessment for Decision

[29] The applicant complains that he was not provided a copy of the Narrative Report until after all of the impugned decisions had been made. He also argues that, even if the failure to produce such a document would sometimes not amount to a breach of procedural fairness, it does in this case because: (i) the Narrative Report misrepresents the applicant's situation in ways that could have been explained if he had been given notice of the document; and (ii) the misrepresentation is such that the Narrative Report amounts to an instrument of advocacy that entitled the applicant to the opportunity to respond.

[30] Some of the passages in the Narrative Report that the applicant complains about are as follows:

1. The reference in the Degree of Establishment section that financial struggles are part of the reason that the applicant returned to the drug trade prior to his arrest (he argues that, given the chance, he could have pointed out that he had a job offer that would prevent such financial struggles);
2. The reference in the Humanitarian and Compassionate Factors section that he admits to dealing drugs for financial gain during some of his conviction-free time (he argues that, given the chance, he could have pointed out that the admissions were limited to a period of time long before the Index Offence, and that this would have been evidence that the Index Offence was indeed an aberration);
3. The references in the Potential for Rehabilitation section that the applicant (i) gravitates toward negative associates and the drug trade for financial gain during stressful times; and (ii) portrays himself as a victim (he argues that, given the chance, he could have argued that these passages misrepresent him); and
4. The quote from the Assessment for Decision (he argues that the quoted passage misrepresents him which, given the chance, he could have shown).

[31] The Federal Court of Appeal (FCA) decision in *Sharma* dealt in detail with procedural fairness requirements in the context of an inadmissibility process under section 44 of the *IRPA*. After considering the factors mentioned in *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817, and the limited discretion in inadmissibility proceedings, the FCA concluded that "the duty of fairness is clearly not at the high end of the spectrum" (para 29), and "a relatively low degree of participatory rights is warranted" (para 34). The FCA was satisfied that:

> To the extent that the person is informed of the facts that have triggered the process[,] is given the opportunity to present evidence

> and to make submissions, is interviewed after having been told of the purpose of that interview and of the possible consequences, is offered the possibility to seek assistance from counsel, and is given a copy of the report before the admissibility hearing, the duty of fairness will have been met.
>
> [*Baker* at para 34.]

[32] All of the steps referred to in this quote were followed in this case with the exception that the Narrative Report was not given to the applicant before the admissibility hearing. However, I am not convinced that there are any additional explanations that the applicant could have given in respect of the issues identified in paragraph [30] above that could have altered the Removal Decision, even if the Narrative Report had been produced earlier. These issues are addressed in the section below concerning Alleged Errors in the Impugned Decisions. It is also important to note the lack of discretion that was available to IRB Member McPhalen in making the Removal Decision: *Sharma* at paras 19 and 24. I conclude that the failure to give the applicant a copy of the Narrative Report before the admissibility hearing did not prejudice the applicant and therefore was not a reviewable error.

[33] The applicant also argues that he was entitled to earlier production of the Narrative Report because it constitutes an instrument of advocacy. I disagree. Firstly, the Narrative Report is generally considered a *pro forma* document, whose essential purpose is to list relevant information from the file (regarding the criminal conviction and related objective facts) and to provide a brief rationale for the Officer's actions and recommendation: *Sharma* at para 33. The officer making the Decision to Report was expected to form opinions on the documents she reviewed and it was entirely appropriate for her to express those opinions (even strong ones) in the Narrative Report. The applicant must show more than this to establish that the Narrative

Report is an instrument of advocacy. In fact, I have difficulty conceiving of any situation in which the Narrative Report could be considered an instrument of advocacy without also being unreasonable, and hence subject to being set aside for that reason as well. As discussed below, I am not convinced that the Decision to Report or the contents of the Narrative Report are unreasonable in any respect. I am also not convinced that the Narrative Report is an instrument of advocacy.

[34] The applicant argues that, even if the failure to provide the Narrative Report does not normally amount to a breach of the duty of fairness, it does in the present case because the Narrative Report quotes from, and is guided by, a separate document (the Assessment for Decision) which the applicant was not warned would be referred to as part of the inadmissibility process.

[35] I reject this argument. In *Chand v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 548 at para 24 [*Chand*], this Court found no obligation to produce documents referred to in a narrative report (referred to there as a Highlights Report) because they were documents that the Minister could reasonably expect the applicant to have. That is certainly the case of the Assessment for Decision, which was part of a parole application process that the applicant had initiated just a few months before.

(3) Failure to Alert the Applicant that CSC Documents Would be Considered

[36] The applicant argues that the applicant should have been given notice that the decision-maker would rely on the Assessment for Decision. I disagree. This document addresses some of

the same issues as are relevant to the Decision to Report, including the nature and history of the applicant's crimes and his potential for rehabilitation. In my view, it could not have been a surprise to the applicant that it was referred to in the context of the inadmissibility process.

[37] I am not convinced by the applicant's argument that the respondent failed to follow its own policy when it failed to give the applicant notice of the documents it intended to rely on. The applicant refers to Immigration Manual ENF 5: Writing 44(1) Reports, Appendix A, which provides form letters to be sent to a person at the outset of an inadmissibility process depending on whether the person will be interviewed or not. The form for cases where no interview is foreseen provides for notice that information may be obtained from other sources. The applicant argues that this form should have been used in his case because it would have alerted him to the possibility that documents emanating from CSC would be referred to. However, the applicant was interviewed in this case. I am not convinced that the form for cases where no interview is foreseen was called for.

[38] I conclude that there was no error in using the form letter intended for cases where an interview is foreseen, and that it was not necessary to give the applicant advance notice that the Assessment for Decision would be relied upon.

(4) Conclusion on Procedural Fairness Issues

[39] For the foregoing reasons, I am not convinced that there was any breach of procedural fairness in this case with the possible exception of the failure to give the applicant a copy of the

Narrative Report prior to the admissibility hearing. However, this failure did not amount to a reviewable error.

C. *Alleged Errors in the Impugned Decisions*

[40] In the applicant's arguments, there is some overlap between those related to procedural fairness and those discussed in this section. Of particular importance, the applicant notes that the standard of review for conclusions that do not go to procedural fairness is reasonableness. He argues that it is unfair that certain conclusions were reached on the basis of information and documents that he was not given the chance to challenge before the impugned decisions were made, such that he is now faced with having to show that those conclusions were unreasonable rather than simply incorrect. This point is discussed at the end of this section.

(1) Failure to Recognize the Index Offence as an Aberration

[41] The applicant argues that the Index Offence is an aberration for the applicant "after decades in Canada as a law abiding person." The applicant also argues that the Narrative Report is misleading when it states that he admits that he was dealing drugs for financial gain during some of that time. The applicant points to a Preliminary Assessment Report by CSC that states that he quit selling drugs around 2005. The applicant argues that it was misleading to indicate that he was selling drugs "during some of that time" without acknowledging that all of that time was before 2005, long before the Index Offence.

[42] The respondent notes that the period of time referred to in the Narrative Report is that during which the applicant remained conviction-free. Based on the information set out in paragraph [5] above, this would appear to be the period from 1998 to 2013. The respondent argues that there is no suggestion in the Narrative Report that any part of that period during which the applicant admitted selling drugs was after 2005 and so the statement is not misleading.

[43] I note first that it is an exaggeration to claim that the applicant had been law-abiding for decades before the Index Offence. By his own admission, only about seven years passed between the time he claims he stopped selling drugs (around 2005) and his arrest for the Index Offence (2012). I am not convinced that the applicant's Index Offence was an aberration of significance.

[44] In any case, I am not convinced that anything in the reference to the applicant's admitted drug selling during some of the time that he was conviction-free was misleading.

(2) Failure to Consider a Job Offer Made to the Applicant

[45] The applicant argues that the following statements in the Degree of Establishment section of the Narrative Report suggest that he will likely turn to crime: (i) "financial struggles are part of the reason why he returned to the drug trade prior to his arrest"; and (ii) "had to close the business and liquidate the assets". The applicant contests both the implication that financial pressure would push him toward crime, and the suggestion that he lacks means of otherwise supporting himself. Specifically, the applicant notes a job offer that he had received from an old acquaintance.

[46] The applicant argues that it was misleading and unreasonable to suggest in the Narrative Report that the applicant would turn to crime, without acknowledging the evidence that he had a job offer that would prevent the financial pressures that were of concern.

[47] The respondent argues that the job offer was not so probative on the issue of establishment in Canada that it was unreasonable not to mention it. The respondent notes that the Narrative Report does not suggest that the applicant would have any difficulty finding employment.

[48] I agree with the respondent. I am not convinced that Officer Genovey's silence regarding the job offer was unreasonable or misleading. I am also not convinced that she failed to consider the applicant's job offer.

(3) Misrepresentation in the Assessment for Decision

[49] The applicant argues that the quote in the Narrative Report from the Assessment for Decision (reproduced at paragraph [15] above) misrepresents the applicant's situation. Specifically, he complains that the statements as to his comfort with the criminal lifestyle and his lack of insight into his offence cycle are sharply at variance with statements on the record from him, Ms. Bridgman, his son Kaylan, Kaylan's grandmother, and a friend.

[50] The respondent argues that reports from CSC officials can reasonably be viewed as having greater weight than statements from interested non-professionals. I agree. Clearly, the respondent would prefer that greater weight had been given to the submissions made on his

behalf. However, I am not convinced that Officer Genovey acted unreasonably in determining the relative weight to be given to the documents before her. Moreover, I am satisfied that the passage from the Assessment for Decision quoted in the Narrative Report is a reasonable reflection of the Assessment for Decision as a whole.

(4) Conclusion on Alleged Errors in the Impugned Decisions

[51] I return now to the applicant's argument that he is prejudiced by the fact that he must establish that alleged errors in the Narrative Report were unreasonable, whereas this hurdle would have been lower if he had been given an opportunity to comment on the Narrative Report before all of the impugned decisions had been made. Following my review of the alleged errors, and the comments the applicant asserts that he would have made on the Narrative Report if he had been given the opportunity, I am not convinced that any of the impugned decisions would have had a different result if the various errors in the Narrative Report alleged by the applicant had been addressed prior to those decisions being rendered.

[52] It is clear that the applicant was not entitled to see and comment on the Narrative Report prior to the Decision to Report or the Referral Decision. Based on the passage from *Sharma* quoted in paragraph [31] above, the applicant may have been entitled to be given a copy of the Narrative Report before the admissibility hearing, but I see no argument that the applicant might have made that could have changed the result, especially in view of the lack of discretion that was available on the Removal Decision.

[53] For the reasons discussed above, I find no errors in the impugned decisions.

VI. Conclusions

[54] For the reasons provided, I have concluded that the present applications should be dismissed.

[55] The applicant has put forward three questions which he asks me to certify as serious questions of general importance. I have reworded them somewhat and reproduce them here:

> For long term permanent residents faced with an inadmissibility proceeding under section 44 of the *IRPA*, is there any breach of the duty of fairness where:
>
> 1. A single officer functions both as the regional manager or director (as contemplated in Immigration Manual ENF 6) and the Minister's delegate?
>
> 2. The permanent resident is not given notice that the decision-maker may obtain information from reports prepared by other enforcement agencies?
>
> 3. The Narrative Report, by virtue of its contents, forms an instrument of advocacy and it is not disclosed to the permanent resident before the Referral Decision or the admissibility hearing?

[56] With regard to the first of the proposed questions, the applicant's position that the role of the regional manager cannot be performed by the same person as the Minister's delegate is unsupported by any reading of the *IRPA* or any regulations or policies thereunder to which I have been directed. The inadmissibility process under section 44 of the *IRPA* contemplates two steps: a decision to report and then a referral to an admissibility hearing. I have seen no indication that it was ever intended that, in the case of long term permanent residents, an additional step would apply. In the absence of any reasonable basis for believing that the applicant's position may have merit, it is my view that the first of his proposed questions is not serious.

[57] In my view, the second of the applicant's proposed questions is answered in *Chand* (see paragraph [35] above). Given the "relatively low degree of participatory rights" in the inadmissibility process (*Sharma* at para 34), I see no reason to question the conclusion in *Chand*. I conclude that the second proposed question is likewise not serious.

[58] Because of my conclusion that the Narrative Report was not an instrument of advocacy, it follows that the third question proposed by the applicant would not be determinative.

[59] For these reasons, I decline to certify any question in the present matter.

JUDGMENT in IMM-260-17, IMM-261-17 and IMM-262-17

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review in file nos. IMM-260-17, IMM-261-17 and IMM-262-17 are dismissed.

2. No serious question of general importance is certified.

3. A copy of the present judgment and reasons shall be placed in file nos. IMM-260-17, IMM-261-17 and IMM-262-17.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-260-17, IMM-261-17, IMM-262-17
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