Federal Court  Cour fédérale

Date: 20180117

Dockets: IMM-2352-17
IMM-3966-16

Citation: 2018 FC 44

Ottawa, Ontario, January 17, 2018

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

OMAR HUSSEIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Omar Hussein, seeks judicial review of two decisions. The Applications for Judicial Review were heard together because they arise from the same events. The Applicant seeks judicial review of the decision of a Minister's Delegate, dated May 11, 2017, refusing his request to reconsider a decision made in July 2010, which found that he was ineligible to make a claim for refugee protection in Canada due to the *Safe Third Country Agreement* [SCTA]. The

Applicant also seeks judicial review of the decision of another Minister's Delegate, dated September 6, 2016, which issued a removal order against him pursuant to subsection 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c27 [the Act].

[2] For the reasons that follow, both Applications for Judicial Review are dismissed.

I. Background

[3] The Applicant is a citizen of Somalia. He arrived in the United States around April 2010 and first attempted to enter Canada in July 2010 to make a refugee claim.

[4] In accordance with paragraph 101(1)(e) of the Act and the STCA with the United States, the Applicant would be precluded from making a refugee claim because he first arrived in the United States and should have sought asylum there.

[5] Despite the provisions of the Act and the STCA, the Applicant has made several attempts to enter Canada in order to make a refugee claim, each time asserting that he is the nephew of Ahmed Musse Gedi [Mr. Musse Gedi], a Canadian citizen and, therefore, that the exception for claimants with relatives in Canada (i.e. the "anchor relative" exception to the STCA) applies to permit him to make a refugee claim.

[6] The Applicant first entered Canada on July 26, 2010, at the Ambassador Bridge in Windsor, Ontario. Both the Applicant and Mr. Musse Gedi were interviewed. Ultimately, the

Minister's Delegate was not satisfied that the two were actually related. The Applicant was, therefore, determined to be ineligible to make a refugee claim.

[7] The Applicant entered Canada again on February 22, 2012, this time at Fort Erie, Ontario. He again claimed that he was the nephew of Mr. Musse Gedi. The Applicant and Mr. Musse Gedi presented documentary evidence which had not been presented on July 26, 2010. They were also interviewed again. Upon consideration of the evidence and their interviews, the Minister's Delegate was again unconvinced that the Applicant and Mr. Musse Gedi were, in fact, related.

[8] On April 17, 2016, the Applicant entered Canada at an unmarked border near Emerson, Manitoba and was arrested. He tried to make a refugee claim upon arrest, but he was determined to be ineligible to do so in accordance with paragraph 101(1)(c) of the Act, because of his previous failed attempts.

[9] On July 20, 2016, the Applicant made a written request to the CBSA for a reconsideration of the original eligibility decision made on July 26, 2010. He argued that there were new, relevant documents which had not been considered in July, 2010.

[10] Before receiving a decision with respect to his request for reconsideration, the Applicant was found to be inadmissible to Canada due to his arrival in Canada in April 2016, and his failure to comply with paragraph 20(1)(a) of the Act . On September 6, 2016, a removal order was issued pursuant to subsection 44(2).

[11] On February 27, 2017, the Applicant commenced an application in this Court for an order in the nature of *mandamus* to compel the Respondent to make a decision on his reconsideration request (IMM-901-17). This application was withdrawn after the Respondent rendered its decision on the Reconsideration request.

[12] On May 11, 2017, the Minister's Delegate denied the Applicant's request for reconsideration of the July 26, 2010 decision. This decision is the subject of this Application for Judicial Review (IMM-2352-17).

[13] The Applicant also seeks judicial review of the September 6, 2016 removal order, which the Applicant argues is the product of fettered discretion (IMM-3966-16).

II. Decision Under Review: The May 11, 2017 Reconsideration Decision

[14] The Reconsideration Decision is in three parts. The Minister's Delegate: first, summarizes the July 26, 2010 ineligibility decision, based upon notes made at the time of the decision; second, summarizes the February 22, 2012 ineligibility decision; and, third, considers whether reconsideration is warranted.

[15] With respect to the ineligibility decision dated July 26, 2010, at Windsor, Ontario, the Minister's Delegate notes that, upon the Applicant's arrival in Windsor, Ontario, he had no identity documentation to confirm his name, date of birth, or country of citizenship. He claimed that he was the nephew of Ahmed Musse Gedi, a Canadian Citizen, who was his mother's half-brother. He presented a photocopy of Mr. Musse Gedi's Ontario Driver's License, as well as

a photocopy of a sworn statutory declaration, made by Mr. Musse Gedi, which declared that the Applicant was his nephew. The Applicant was interviewed in person, and Mr. Musse Gedi was interviewed by telephone. The Notes indicate that the Applicant provided vague answers with respect to his own biographical details, including with respect to his prior residences and the age and whereabouts of his wife and children.

[16] The Applicant and Mr. Musse Gedi gave several inconsistent answers in response to questions about their family and their personal histories, including:

- The Applicant stated that his mother's name is Amina Elmi. Mr. Musse Gedi stated that her name was Amina Ibrahim.
- The Applicant stated that his mother had a total of 5 children: 2 daughters (both of whom passed away in infancy) and three sons. Mr. Musse Gedi stated that his sister only had 3 children, all of whom were boys.
- The Applicant stated that his brother's names were Abdi Hussein, approximately 36 years old, and Abdi Lahe, approximately 38 years old. Mr. Musse Gedi said their names were Said and Abdilli, and that he did not know how old they were.
- The Applicant stated that he had not seen Mr. Musse Gedi since he was a child. Mr. Musse Gedi stated that he had never seen the Applicant, and that he had only been contacted by him recently.
- The Applicant stated that Mr. Musse Gedi paid a "facilitator" $4000 to help him leave Ethiopia and travel to the United States. He further stated that Mr. Musse Gedi made all the "arrangements" with the facilitator. Mr. Musse Gedi said that he sent the Applicant $500 dollars once he had already arrived in the United States, to help him fly to Canada, that this was the only time he ever gave money to the Applicant, and that he did not know how the Applicant got to the United States.

[17] The summary notes that the Applicant was confronted with discrepancies in the two accounts. The Applicant responded by pleading with the interviewing Officer to "have compassion and admit him into Canada." With respect to whether he had ever met Mr. Musse Gedi, he changed his story and stated that he did not remember ever having met Mr. Musse Gedi as a child. The summary also notes that the Applicant and Mr. Musse Gedi provided different stories and contradictory statements about several aspects of their narratives.

[18] At the conclusion of the interviews, the Minister's Delegate was not satisfied that Mr. Musse Gedi was a "genuine qualifying anchor relative."

[19] With respect to the ineligibility decision dated February 22, 2012, at Fort Erie, Ontario, the summary notes that the Applicant was questioned about how he came to have copies of birth certificates for himself, his mother, and Mr. Musse Gedi at that time.

[20] Both the Applicant and Mr. Musse Gedi were interviewed in person. Several discrepancies were noted in their answers to questions, including:

- Mr. Musse Gedi stated that he had provided documents to verify his relationship to the Applicant during the July 26, 2010 interview. However, he had not done so.
- The Applicant stated that when he first arrived in the United States, he stayed with his mother's cousin, Basra Muse. He stated that Basra Muse has a daughter named Ubax Cabdi. Mr. Musse Gedi stated that Basra Muse is a family friend from Somalia, and that he is not related to her and that she has a daughter named Ubax Ali.
- The Applicant stated that he had never met Mr. Musse Gedi, but that he had spoken with him by phone, intermittently, beginning in 2002 and that his mother and uncle spoke by phone every two or three months. Mr. Musse Gedi stated that he had last seen the

Applicant when he was seven years old, and that they had not spoken until 2010, when he arrived in the United States. Mr. Musse Gedi stated that he does not speak with his sister and does not have her telephone number.

- The Applicant stated that Mr. Musse Gedi had sent money to his mother in Somalia several times. Mr. Musse Gedi stated that he had never sent any money to the Applicant's mother, or to anyone in Somalia.
- The Applicant stated that Mr. Musse Gedi and his mother did not grow up together as children. Mr. Musse Gedi stated that he had lived with his sister all his life.

[21] Upon consideration of the evidence and the results of the interviews, it was found that there was insufficient evidence to support the Applicant's purported relationship with Mr. Musse Gedi.

[22] With respect to the Request to Reconsider the July 2010 decision, the Minister's Delegate noted that the Applicant's request was based on his assertion that the initial ineligibility decision was made "without proper regard to the documentation provided." She noted that the evidence submitted as part of the reconsideration request consisted of the 2010 declaration from Mr. Musse Gedi swearing to the genuineness of the relationship, as well as birth certificates of the Applicant, his mother, and Mr. Musse Gedi.

[23] The Minister's Delegate noted the lack of documentary evidence presented by the Applicant upon arrival in Windsor in 2010. She also noted the many discrepancies in the answers given by the Applicant and Mr. Musse Gedi. She found that what had been provided in 2010 had been fully considered before that decision was made. She further noted that, at the second

interview on February 22, 2012, more documents were provided by the Applicant, including the three birth certificates, all of which were reviewed by the interviewing Officer and by the Minister's Delegate at that time.

[24] The Minister's Delegate found that the second ineligibility decision in February 2012 had provided the Applicant with an opportunity to have his initial claim reviewed and reconsidered by Officers who were not involved in the July 2010 decision, and to present supporting documents and make additional submissions. In other words, the Minister's Delegate found that the second ineligibility decision was "in itself, a reconsideration of the initial refugee claim" which afforded the Applicant a chance to submit additional documents and participate in the interview process. The Minister's Delegate emphasized that the documents reviewed at the February 22, 2012 interview included the documents submitted with the current request for reconsideration (i.e. the three birth certificates and the 2010 statutory declaration). She noted that thorough interviews were conducted to provide an opportunity to gather additional information to support the familial relationship, and that the documents presented along with the verbal evidence were fully considered before the decision was made in 2012.

[25] The Minister's Delegate found that based on her review of the documents and the notes made by the decision-makers at both previous refugee claims, the request for reconsideration of the July 26, 2010 decision would not be granted, i.e., the Minister's Delegate would not reconsider the decision.

III. Decision Under Review: The September 2016, Exclusion Order

[26] As noted above, the Applicant entered Canada on April 17, 2016 after having been refused entry twice previously. He was found to be ineligible to make a refugee claim because of the prior ineligibility decisions, pursuant to paragraph 101(1)(c).

[27] On April 18, 2016, an Immigration Officer wrote a report pursuant to subsection 44(1) of the Act reporting that the Applicant was inadmissible to Canada for failing to comply with paragraph 20(1)(a), which requires that persons seeking to enter and remain in Canada be in possession of an immigrant visa.

[28] A Minister's Delegate (a different Delegate than made the May 11, 2017 decision, i.e., the "section 44 Delegate") reviewed the Officer's report and interviewed the Applicant. The Applicant confirmed and acknowledged all of the facts on which the report was based.

[29] At the interview, the Applicant requested that the section 44 Delegate proceed to reconsider the initial determination of ineligibility (i.e. the 2010 decision, for which he had already requested reconsideration in his July 20, 2016 letter to CBSA at Windsor) or, alternatively, defer issuing a removal order until after the reconsideration request had been decided. The Applicant referred to another case where this was done.

[30] The Notes to File of the section 44 Delegate acknowledge that she was aware of the case referred to by the Applicant. However, the section 44 Delegate declined to conduct the

reconsideration or defer her decision. The section 44 Delegate advised the Applicant that she "considered all the evidence on the file including being informed by [her supervisor] that the request for the reconsideration would be dealt with by the originating office". The section 44 Delegate conducted the interview, considered the evidence and submissions and issued a removal order against the Applicant pursuant to subsection 44(2) of the Act.

IV. The Issues

[31] Based on the arguments of the Applicant, the issues are:

- Did the Minister's Delegate deny the Applicant procedural fairness by relying on credibility concerns which arose in July 2010 and February 2012 which the Applicant did not have the opportunity to address?
- Did the Minister's Delegate err in refusing to reconsider the July 2010 decision?
- Did the section 44 Delegate fetter her discretion by issuing a removal order?

V. The Standard of Review

[32] A request for reconsideration is a discretionary decision to be reviewed on the standard of reasonableness (*Trivedi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 422 at para 17, 187 ACWS (3d) 213 [*Trivedi*]).

[33] Where the reasonableness standard applies, the analysis focuses on the existence of justification, transparency and intelligibility within the decision-making process, and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of

the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). Deference is owed to the decision-maker and the Court will not re-weigh the evidence.

[34] Decisions which are the products of fettered discretion will, *per se*, be unreasonable (*Stemjion Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 at para 24, 341 DLR (4th) 710 [*Stemjion Investments*]).

[35] Questions of procedural fairness are to be reviewed on a correctness standard (*Trivedi* at para 18; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339).

VI. Did the Minister's Delegate deny the Applicant procedural fairness by relying on credibility concerns which arose in July 2010 and February 2012 which the Applicant did not have the opportunity to address?

A. *The Applicant's Submissions*

[36] The Applicant argues that he was denied procedural fairness because the Minister's Delegate did not afford him an opportunity to explain the inconsistent answers given by him and Mr. Musse Gedi in July 2010 and February 2012 *before* making her decision on the request for reconsideration, on May 11, 2017. He argues that the Minister's Delegate relied on these inconsistencies in refusing his request for reconsideration.

[37] He submits that in July 2010, he was only confronted with one inconsistency regarding whether Mr. Musse Gedi and the Applicant had ever met during the Applicant's time in Somalia.

The Applicant asserts that he explained that he had been told by family members that they had met when he was younger, but that he had no personal recollection of this. The Applicant submits that there were several inconsistencies relied on by the Officer and Minister's Delegate that he could have explained, including the various ways his mother can state her name, the number of children in his family and the money provided by Mr. Musse Gedi for the Applicant's travel to Canada. He points to his affidavit which now offers explanations for these inconsistencies.

B. *The Respondent's Submissions*

[38] The Respondent notes that in the request for reconsideration, the Applicant referred to the three birth certificates and did not address the previous inconsistencies, which he was aware of, nor did he offer explanations that he now offers in his affidavit. The Respondent points out that the inconsistencies were extensive – both between the Applicant and Mr. Musse Gedi's responses to questions and between their responses to the same or similar questions in 2010 and in 2012. The Respondent submits that the Applicant was confronted with the discrepancies in his responses in 2010 and 2012, regarding when he last saw his uncle, the names of his mother's siblings, and whether his uncle had sent $4000 to him to travel to Canada or whether he and his mother had saved this money. The interview notes from 2010 also reveal that the Applicant was confronted more generally by the Officer who advised him that their stories were sometimes contradictory and different.

[39] The Respondent also submits that on a discretionary reconsideration request there is no obligation to notify the Applicant of inconsistencies in the record.

C. *The Minister's Delegate did not breach any duty of procedural fairness*

[40] The Applicant's argument that there was a breach of procedural fairness appears to be based on his mistaken assumption that the Minister's Delegate's decision to not reconsider the July 2010 decision was based on the inconsistent answers and the resulting credibility concerns.

[41] The issue of whether there was a breach of procedural fairness does not arise in the context of the decision under review. The Minister's Delegate's discretionary decision to refuse reconsideration was not based on inconsistent answers provided by the Applicant or Mr. Musse Gedi, or on credibility in general. The Applicant requested reconsideration of the July 26, 2010 ineligibility decision because it "was made without proper regard to the documentation" (i.e. the birth certificates which had not been provided). The Minister's Delegate's decision to refuse the reconsideration request was decided on this basis. She found that that the birth certificates had been considered in the February 22, 2012 process, and the Applicant and Mr. Musse Gedi were thoroughly interviewed, again, on that date. Therefore, she determined that a further reconsideration was unwarranted. In other words, the Applicant received in 2012 what he now requests.

[42] If the issue were at play, it is well established that the duty of procedural fairness varies with the context. Nonetheless, there is a basic duty of fairness owed to advise an applicant of the case they have to meet and to provide an opportunity for an applicant to respond.

[43] If the 2010 and 2012 decisions had been the subject of judicial review, I would still find that there was no breach of procedural fairness. The inconsistencies on key aspects of their family history were raised but the explanations provided did not address the inconsistencies. The Applicant and Mr. Musse Gedi gave many inconsistent answers, and their own answers were not consistent between 2010 and 2012. They had time between 2010 and 2012 to familiarise themselves with their family history and apparently did not do so. Some of the inconsistencies were minor, but others were more significant, including whether Mr. Musse Gedi had provided money for the Applicant to travel to Canada. When confronted with the general concern that their stories differed and with specific inconsistencies, the Applicant changed his story and asked for compassion, rather than providing the explanations he now offers and Mr. Musse Gedi extricated himself from the interview.

[44] The Applicant now seeks to provide explanations; for example, that there is a distinction between stating that Mr. Musse Gedi did not send money to the Applicant for his travel and sending money to his mother, which she in turn gave to him for his travel to Canada. However, this explanation remains inconsistent with Mr. Musse Gedi's response that he did not send any money to the Applicant's mother, and with the Applicant's statement in 2012 that he and his mother worked and saved the money.

[45] With respect to the reconsideration decision, the facts differ from those in *Cishahayo v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1237, 420 FTR 136, where the Court found that an applicant should be given an opportunity to respond to concerns over the authenticity of documents relied on before the reconsideration decision is made. That

case involved an actual reconsideration decision, as opposed to a request for reconsideration. Moreover, the reconsideration was decided *on the basis* of a concern regarding the authenticity of documents. In the present case, the Minister's Delegate exercised her discretion to refuse the reconsideration request; i.e. she did not proceed to reconsider the July 26, 2010 decision. Moreover, as discussed above, this discretionary decision to refuse the reconsideration request was *not* made on the basis of any credibility concerns. As a result, the Minister's Delegate was under no obligation to put the inconsistencies to the Applicant for a (further) explanation.

VII. Was the Minister's Delegate's Decision to refuse to reconsider the July 2010 decision reasonable?

A. *The Applicant's Submissions*

[46] The Applicant submits that the reconsideration decision is unreasonable. He submits that the Minister's Delegate erred by failing to review and analyze the three birth certificates submitted as part of the request for reconsideration. He asserts that the three birth certificates clearly establish the relationship between himself and Mr. Musse Gedi. He submits that the Minister's delegate implicitly found that the birth certificates were not genuine, and that this should have triggered a separate opportunity for the Applicant to respond to the concern.

[47] The Applicant reiterates that the Minister's Delegate should have put the credibility concerns to him, which he could have explained as he has done in his affidavit filed in support of this Application and which would have confirmed that Mr. Musse Gedi was his uncle.

[48] At the hearing of this Application, the Applicant did not pursue his written argument that the Minister's Delegate should have disregarded the interview notes from the February 22, 2012 because he had already been found ineligible to make a refugee claim, and therefore that the Officer lacked jurisdiction to interview him.

B. *The Respondent's Submissions*

[49] The Respondent notes again that the basis for the Applicant's request for reconsideration of the July 2010 decision was that it was made without regard to the documents, and the Minister's Delegate addressed the request on this basis. The only documents submitted in July 2010 were a photocopy of Mr. Musse Gedi's drivers licence and a photocopy of his statutory declaration. The three birth certificates were provided only in 2012.

[50] The Respondent points out that a Minister's Delegate exercises discretion in choosing whether to reconsider an ineligibility decision. The Respondent characterises this discretion as a screening exercise, which does not involve a full review and weighing of evidence (*Canada (Minister of Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at 5, 324 DLR (4^{th}) 292 [*Kurukkal*]). The Respondent submits that there is no entitlement to a reconsideration upon receipt of new information; rather, it is up to applicants to show that the interests of justice or unusual circumstances warrant a reconsideration (*Ghaddar v Canada (Minister of Citizenship and Immigration)*, 2014 FC 727 at para 19, 460 FTR 147 [*Ghaddar*]) and the Applicant did not do so.

[51] The Respondent submits that the Minister's Delegate recognized that she had discretion to reconsider the decision but chose not to exercise that discretion in the circumstances, noting that all the information the Applicant sought to be considered had in fact been considered in 2012.

C. *The Decision is Reasonable*

[52] In *Kurukkal*, the Court of Appeal confirmed that an administrative decision-maker does have discretion to reconsider a decision (at para 3) and elaborated at paras 4-5:

> [4] . . . The immigration officer was not barred from reconsidering the decision on the basis of *functus officio* and was free to exercise discretion to reconsider, or refuse to reconsider, the respondent's request.
>
> [5] The judge directed the immigration officer to consider the new evidence and to decide what, if any, weight should be attributed to it. In our view, that direction was improper. While the judge correctly concluded that the principle of *functus officio* does not bar a reconsideration of the negative section 25 determination, the immigration officer's obligation, at this stage, is to consider, taking into account all relevant circumstances, whether to exercise the discretion to reconsider.

[53] Justice Manson applied the same principles in *Borovic v Canada (Minister of Citizenship and Immigration)* 2016 FC 939, [2016] FCJ No 960 (QL), noting that an immigration officer has the discretion to reconsider a decision or to refuse to do so, at para 15:

> [15] There is no doubt that an immigration officer must consider his or her discretion in reviewing a reconsideration request, but absent a failure to recognize the existence of such a discretion by an officer, the officer is free to exercise that discretion to reconsider, or to refuse to do so. While the principle of *functus officio* does not bar a reconsideration of a negative H&C determination (section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c-27), the officer's obligation is simply to

> consider, taking into account all relevant circumstances, whether to exercise that discretion to reconsider or not (*Canada (Minister of Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at paras 5-6; *Rashed v Canada (Minister of Citizenship and Immigration)*, 2013 FC 175 at paras 48-49).

[54] The Minister's Delegate is required to take all relevant circumstances into account in deciding whether to exercise the discretion to reconsider (*Kurukkal* at para 5).

[55] The Minister's Delegate's decision reflects the governing jurisprudence. The first step in the two step approach is for the Minister's Delegate to determine whether to proceed to reconsider the previous decision. The second step – an actual reconsideration of the earlier decision – would not proceed unless the Minister's Delegate decides to exercise his or her discretion to reconsider the earlier decision. The decision in this case, which did not proceed past the first step, reveals that the Minister's Delegate was very aware of the circumstances, and that she exercised her discretion appropriately.

[56] The Minister's Delegate noted the extensive history of the Applicant and considered whether, in this context, reconsideration was appropriate. The Minister's Delegate found that the three birth certificates were not new evidence as they had been considered by the Officer and Minister's Delegate at the February 22, 2012 interview. As a result, the interests of justice did not merit a further reconsideration.

[57] There is no general obligation to grant the reconsideration request where "new" evidence is submitted. An applicant must show that this is warranted in the interests of justice, or given the unusual circumstances (*Ghaddar* at para 19). The Minister's Delegate did not err by failing to

analyze the three birth certificates. The consideration of such evidence would arise at the second step −i.e., the actual reconsideration, if the Minister's Delegate had exercised her discretion to reconsider.

[58] The Minister's Delegate did not implicitly find that the birth certificates were not genuine. She made no finding regarding the birth certificates other than that they had already been considered in 2012. As noted, the Minister's Delegate found that the Applicant had the reconsideration he now requests back in 2012, given that all the same documents he seeks to have considered were considered.

[59] The Minister's Delegate's role was to assess the circumstances and determine whether reconsideration was warranted in the interests of justice. The Minister's Delegate reasonably found that it was not, because the Applicant had already been given a *de facto* reconsideration in February 22, 2012, where all that "new" evidence was available and had been considered.

VIII. Did the section 44 Delegate fetter her discretion by issuing a removal order in September 2016?

A. *The Applicant's Submissions*

[60] The Applicant asserts that the section 44 Delegate was instructed by her supervisor to proceed with the subsection 44(1) report and issue a removal order despite his request that she instead determine his request for reconsideration of the July 26, 2010 ineligibility decision, or alternatively that she defer her decision until after his reconsideration request (i.e. addressed above) had been considered (by the CBSA office at Windsor).

[61] The Applicant argues that the section 44 Delegate improperly fettered her discretion by following the instructions of her supervisor.

[62] The Applicant disputes the Respondent's argument that this Application for Judicial Review is moot. He argues that the removal order would preclude him from having his eligibility to make a refugee claim determined if judicial review is allowed with respect to the Minister's Delegate's decision to refuse reconsideration. Therefore, the reasonableness of the section 44 Delegate's decision must be determined.

B. *The Respondent's Submissions*

[63] The Respondent notes that the Applicant admitted the facts which formed the basis of the subsection 44(1) Report and the subsequent Removal Order.

[64] The Respondent submits that the section 44 Delegate has a limited discretion which in this case would be limited to deciding whether the underlying facts regarding inadmissibility had been demonstrated. She did not fetter her discretion by refusing the Applicant's request.

C. *The Decision to Issue the Removal Order Is Reasonable; the section 44 Delegate did not fetter her discretion*

[65] The Applicant made two requests for reconsideration. The first request for reconsideration was made by letter dated July 20, 2016 to the Minister's Delegate, requesting that the July 2010 decision made at Windsor be reconsidered by that office. The second request

was made in September 2016−while the first formal request was pending−when the Applicant was faced with a section 44 Report.

[66] The scope of the section 44 Delegate's discretion depends on the circumstances, but is generally considered to be narrow. This Court has stated on several occasions that section 44 Delegates are "simply involved in fact-finding", and that the "only question" they are to resolve is whether to issue a removal order (see *Pompey v Canada (Minister of Citizenship and Immigration)*, 2016 FC 862 at paras 40-42, and the cases cited therein).

[67] Moreover, the Applicant's allegation – that the section44 Delegate advised him that she was "instructed" not to consider his reconsideration request – differs from the section 44 Delegate's evidence. The section 44 Delegate's notes suggest that, rather than being instructed by her supervisor, she made a discretionary decision not to entertain the request. Her notes read:

> I informed [Applicant's Counsel] that I considered all the evidence on the file including being informed by [her supervisor] that the request for reconsideration would be dealt with by the originating office. I conveyed to [Applicant's Counsel] that after consideration of all the evidence, both written and verbal submissions, I decided to proceed with the Minister's Delegate Review.

[68] Therefore, even if the section 44 Delegate had jurisdiction to entertain the request for reconsideration of the July 2010 decision, there is no evidence that she fettered her discretion. Fettering occurs where a decision maker "cuts down" their own lawfully bestowed discretion "in a binding way" (*Thelwell v Canada (Attorney General)*, 2016 FC 1304 at para 14, 48 Imm LR (4th) 43, citing *Stemjion Investments* at para 22).

[69] The notes reveal that the section 44 Delegate was advised that the reconsideration request would appropriately be dealt with where it was made, so there would be no reason for her to overstep or interfere with that ongoing process. The section 44 Delegate fulfilled her role in reviewing the report which the Applicant had accepted. The Applicant acknowledged the facts which supported removal, and in such circumstances, the Minister's Delegate had little discretion other than to issue the removal order.

IX. Conclusion

[70] The Applicant has pursued several applications in an effort to turn back the clock and have a second chance to establish a relationship with an "anchor relative" that he was unable to establish in 2010 because he did not present documents and he did not establish a relationship in his oral evidence. The Minister's Delegate exercised her discretion to decline to reconsider the 2010 decision. No error has been demonstrated in the exercise of that discretion. The decision is reasonable.

[71] The section 44 Delegate's decision to issue the removal order is also reasonable. The Applicant acknowledged the facts that support the issuance of the Order and the section 44 Delegate did not fetter her discretion.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review in IMM-2352-17 is dismissed.

2. The Application for Judicial Review in IMM-3966-16 is dismissed.

3. No question was proposed or arises for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-2352-17 AND IMM-3966-16
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