Federal Court  Cour fédérale

Date: 20180501

Docket: IMM-4467-17

Citation: 2018 FC 468

Ottawa, Ontario, May 1st, 2018

PRESENT: Mr. Justice Grammond

BETWEEN:

EDWIN CARLOS MERINO ORTEGA

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Upon his arrival in Canada, the applicant, Mr. Merino Ortega, a citizen of El Salvador, declared that he had been a member of the *Frente Farabundo Martí para la liberación nacional* [FMLN]. On that basis, a delegate of the respondent Minister referred his case to the Immigration Division of the Immigration and Refugee Board, for the purpose of determining if he is inadmissible to Canada for having been a member of an organization that engaged in terrorist or subversive activities. He now seeks judicial review of that referral. He claims that his

procedural rights were breached in the referral process, because the decision-maker did not provide him with the evidence on which the decision is based, thus depriving him of the opportunity of making meaningful submissions. I am denying his application, as the decision-maker complied with the requirements of procedural fairness laid out by the Federal Court of Appeal and there were no legitimate expectations that the decision-maker would go beyond those requirements.

[2] Section 34 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], provides that a foreign national is inadmissible to Canada for having engaged in, among other things, the subversion of any government or terrorism, or for having been a member of an organization that engaged in such activities. Decisions regarding inadmissibility are made by the Immigration Division. The process by which cases are referred to the Immigration Division is set out in section 44 of the Act. First, subsection 44(1) states that an officer who is of the opinion that a permanent resident is inadmissible may prepare a report that sets out the relevant facts. This is referred to as an inadmissibility report. That report is then transmitted to the Minister or a Minister's delegate. Second, subsection 44(2) states that if the Minister – or, in practice, a delegate of the Minister – is of the opinion that the report is "well-founded," he or she may refer the report to the Immigration Division for an admissibility hearing.

[3] In *Sharma v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319, [2017] 3 FCR 492, the Federal Court of Appeal discussed the scope of the duty of procedural fairness in the context of a referral under section 44 of the Act. Justice Yves de Montigny summarized the scope of that duty as follows (at para 34):

> All of the relevant cases from the Federal Court stress that a relatively low degree of participatory rights is warranted in the context of subsections 44(1) and (2), and that procedural fairness does not require the officer's report to be put to the person concerned for a further opportunity to respond prior to the section 44(2) referral to the [Immigration Division]. 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.

[4] Mr. Merino Ortega was initially informed on September 12, 2017 that an inadmissibility report had been prepared. On that date, his lawyer refused to attend an interview in Montreal, requesting that the interview take place in Ottawa or Gatineau instead. Based on what she perceived as a refusal to make submissions, the Minister's delegate referred the matter to the Immigration Division on that same day.

[5] That, however, was not the end of the story. Mr. Merino Ortega retained a new lawyer. Together with his lawyer and an interpreter, he attended an interview, on October 11, 2017, with an officer of the Canadian Border Services Agency [CBSA] in Ottawa. He was then given a copy of the inadmissibility report. He was also told that he could make submissions. In further correspondence to Mr. Merino Ortega's lawyer on October 17, 2017, the Minister's delegate reiterated that submissions could be made and indicated her willingness to reconsider her decision to refer the matter to the Immigration Division should those submissions warrant it. However, she declined to communicate the evidence that was used to prepare the inadmissibility report.

[6] Mr. Merino Ortega never filed submissions in response to the inadmissibility report. Instead, he commenced this application for judicial review on October 19, 2017.

[7] The process followed by the Minister's delegate complied with the Federal Court of Appeal's decision in *Sharma*. Mr. Merino Ortega was given a copy of the report, which informed him of the substance of the allegations against him. He was given an opportunity to respond, even though he did not avail himself of that opportunity. He had no right to obtain further documentation. He was afforded procedural fairness.

[8] Mr. Merino Ortega further argues that he had a legitimate expectation that he would be supplied the documentary evidence underlying the inadmissibility report, based on representations made by the CBSA. I conclude that the three statements that he invokes do not give rise to any expectation.

[9] First, he points to the language of his Notice to Appear at the October 11, 2017 meeting, which included the following statement:

> Failure to appear for a proceeding under subsection 44(2) of the *Immigration and Refugee Protection Act* will result in all relevant evidence and circumstances reviewed in your absence by the Minister's Delegate to determine if the report is well founded.

[10] This statement cannot be read as an express promise that he would be given copies of the documentary evidence. It was simply a warning that a decision will be made if he does not appear at the interview.

[11] Second, he cites a phone call between his lawyer and a CBSA Officer, on October 10, 2017, apparently to deal with conflicting scheduling instructions. He claims that his lawyer was told that the documentary evidence would be provided at the meeting to be held the next day. However, the only evidence of that conversation is Mr. Merino Ortega's affidavit, which is hearsay. More precise evidence is needed to establish a legitimate expectation.

[12] Third, Mr. Merino Ortega relies on a post-it note that the Officer who conducted the October 11, 2017 interview gave to his lawyer. That note shows the fax number of the Minister's delegate, together with the words "written submissions." Once again, this cannot be construed as a promise that gives rise to a legitimate expectation. It is simply an indication of how to transmit written submissions, which Mr. Merino Ortega declined to do.

[13] Thus, Mr. Merino Ortega was afforded procedural fairness when the Minister's delegate made the decision under review. The application for judicial review will be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question is certified.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4467-17
STYLE OF CAUSE:	EDWIN CARLOS MERINO ORTEGA v. MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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