Federal Court  Cour fédérale

Date: 20190206

Docket: IMM-4523-17
IMM-4939-17

Citation: 2019 FC 154

Ottawa, Ontario, February 6, 2019

PRESENT: The Honourable Madam Justice Walker

Docket: IMM-4523-17

BETWEEN:

SHAZAD ABDUL

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Docket: IMM-4939-17

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Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Shazad Abdul, is a permanent resident of Canada. This judgment addresses two applications for judicial review made by the Applicant pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) as follows:

A. Referral Decision: An application for judicial review of the decision of a Minister's Delegate dated July 20, 2017 to refer the Applicant for an admissibility hearing before the Immigration Division (ID) of the Immigration and Refugee Board pursuant to subsection 44(2) of the IRPA. The application was filed with the Court on October 25, 2017 (IMM-4523-17);

B. Admissibility Decision: An application for judicial review of a decision of the ID dated November 15, 2017 to issue a deportation order to the Applicant in reliance on paragraph 36(1)(a) of the IRPA. The application was filed with the Court on November 20, 2017 (IMM-4939-17).

[2] The two applications for judicial review were heard together. They involve the same parties and arise from the same sequence of events. I will address both applications in this judgment and a copy of the judgment will be placed on both Court files.

[3] For the reasons that follow, the application for judicial review of the Referral Decision is allowed. As a result, the Admissibility Decision cannot stand and the application for judicial review of the Admissibility Decision is also allowed.

I. Background

[4] The Applicant was born in Trinidad and Tobago on May 5, 1972. He is a citizen of Trinidad and Tobago and became a permanent resident of Canada on March 16, 1975.

[5] On February 16, 2016, the Applicant was convicted in Canada of sexual assault contrary to section 271 of the *Criminal Code* (2016 Conviction). He received a sentence of time served in respect of the conviction, which was comprised of 18 months pre-trial custody, factored at 1.5x, for a total of 27 months.

II. Decisions under Review

1. *Referral Decision* (IMM-4523-17)

[6] In order to set the framework for a discussion of the Referral Decision, it is helpful to first set out the provisions of subsections 44(1) and (2) of the IRPA:

Report on Inadmissibility	**Constat de l'interdiction de territoire**
Preparation of report	**Rapport d'interdiction de territoire**
44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.
Referral or removal order	**Suivi**
(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they	(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les

have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

[7] The Referral Decision itself consists of a completed, one-page standard form that contains a recitation of the decision of the Minister's Delegate, together with a series of hand-written notes in the last section of the CBSA Recommendation (described below in paragraph 11 of this judgment). The Referral Decision is based on the following sequence of reports and correspondence.

[8] On June 30, 2016, an officer with Citizenship and Immigration Canada (CIC) completed a report pursuant to subsection 44(1) of the IRPA (Subsection 44(1) Report) stating that, in the officer's opinion, the Applicant is inadmissible pursuant to paragraph 36(1)(a) of the IRPA. The CIC officer formed his or her opinion based on the Applicant's 2016 Conviction. Paragraph 36(1)(a) provides that a permanent resident of Canada is inadmissible on grounds of serious criminality for having been convicted of an offence in Canada punishable by a maximum term of imprisonment of at least 10 years or in respect of which a term of imprisonment of more than six months has been imposed.

[9] By way of letter dated September 29, 2016, the Canada Border Services Agency (CBSA) advised the Applicant that there were reasonable grounds to believe he was inadmissible to Canada pursuant to paragraph 36(1)(a) of the IRPA because of his criminal conviction(s). The

letter stated that a decision regarding a removal order would be made in the near future. A copy of the Subsection 44(1) Report was attached to the letter. The Applicant was invited to make submissions regarding why a removal order should not be sought.

[10] On November 21, 2016, the Applicant filed submissions and evidence with the CBSA, requesting that the Subsection 44(1) Report not be referred to an admissibility hearing pursuant to subsection 44(2) of the IRPA. He submitted that such a referral would cause hardship to himself and his family and that he was fully rehabilitated. The Applicant also submitted that a subsection 44(2) admissibility hearing would not be in the best interests of his Canadian children.

[11] On June 7, 2017, a CBSA Inland Enforcement Officer (CBSA Officer) recommended that the Applicant be referred to an admissibility hearing (CBSA Recommendation). The CBSA Recommendation is a critical document in this application for judicial review as it was the basis for the Referral Decision taken by the Minister's Delegate.

[12] The CBSA Recommendation listed a number of non-reportable convictions involving the Applicant and set out in detail the circumstances of the Applicant's 2016 Conviction, concluding as follows:

> [The Applicant] was charged with Sexual Assault, Sexual Interference, Invitation to Sexual Touching and Forcible Confinement. He eventually pled guilty to Sexual Assault with the other charges being withdrawn by the Crown. This was achieved following 18 months of confinement.

[13] The CBSA Recommendation then reviewed the Applicant's degree of establishment in Canada, humanitarian and compassionate factors and other information regarding the Applicant, including his engagement to the woman with whom he shares two daughters, his relationship with his nieces and nephews in Canada, his employment status, and the best interests of his two daughters (now aged 12 and 2). The CBSA Recommendation also reviewed the Applicant's potential for rehabilitation. I set out further details from the CBSA Recommendation in my analysis as those details are relevant to the issues raised by the Applicant in this application.

[14] The final page of the CBSA Recommendation contains a section for the decision of the Minister's Delegate (Section 11). There are a number of handwritten notations in the section which make reference to concurrence with the CBSA Officer's narrative, the Applicant's "predatory offence" involving a minor victim, and the conclusion that he constitutes a danger to the public. The Minister's Delegate then wrote:

> After discussing this case with the Supervisor and review of the facts related to this case, I concur to refer this case to a hearing. The seriousness of the conviction is concerning given the fact that the victim was 15 yrs old and the nature of the [offence] (predatory behaviour).

[15] On July 20, 2017, the Minister's Delegate issued the Referral Decision, thereby referring the Section 44(1) Report to the ID for an admissibility hearing to determine whether the Applicant was a person described in paragraph 36(1)(a) of the IRPA.

2. *Admissibility Decision* (IMM-4939-18)

[16] On November 15, 2017, the ID issued the Admissibility Decision, ordering the Applicant deported. The Admissibility Decision was based on the Applicant's 2016 Conviction for which he was liable to imprisonment upon conviction to a term not exceeding 10 years and for which he was sentenced to more than six months imprisonment (paragraph 36(1)(a) of the IRPA). On this basis, the ID concluded that the Minister had met his burden of proof that the Applicant is inadmissible to Canada for serious criminality.

[17] Pursuant to subsections 64(1) and (2) of the IRPA, the Applicant had no right to appeal the Admissibility Decision to the Immigration Appeal Division.

III. Preliminary Issue – Amendment of the Style of Cause

[18] The parties submit that the style of cause for each application should be amended to name the Minister of Public Safety and Emergency Preparedness as the Respondent. I agree and the styles of cause will be amended accordingly.

IV. Preliminary Issue – Mootness of the Referral Decision (IMM-4523-17)

[19] The Respondent submits that the application for judicial review of the Referral Decision is moot as the Referral Decision has merged with the Admissibility Decision. The Respondent relies on the decision of this Court in *Chan v Canada (Minister of Employment and Immigration)*, [1987] FCJ No. 449, which involved an application for judicial review of a

Section 20 report, subsequent to which a deportation order had been issued under a prior version of the IRPA.

[20] I have reviewed the Respondent's submissions in this regard but find that the application for judicial review of the Referral Decision is not moot. The Referral Decision and Admissibility Decision must be considered sequentially in order to arrive at a logical result. In *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 (*Sharma*), the Federal Court of Appeal considered a certified question regarding whether the duty of fairness requires that a subsection 44(1) report be provided to the affected person before his or her case is referred for a decision of a Minister's delegate pursuant to subsection 44(2) of the IRPA.
Justice de Montigny stated that the IRPA establishes a three-step process for determining whether a person is inadmissible for serious criminality:

1. The preparation of the subsection 44(1) report;
2. The subsection 44(2) decision by a Minister's delegate to refer the report to the ID for an admissibility hearing; and,
3. The decision of the ID to remove the individual.

[21] Of note for purposes of my analysis is Justice de Montigny's statement in paragraph 19 of *Sharma* that, pursuant to paragraph 45(d) of the IRPA, "the ID appears to have no other option than to make a removal order against the foreign national or the permanent resident if he or she is inadmissible according to the Act".

[22] It follows from this statement that an applicant's practical ability to request review by this Court of a decision taken during the three-step process rests at the subsection 44(1) or (2) stage.

As the ID has little or no discretion but to order the removal of a permanent resident if he or she is inadmissible pursuant to paragraph 36(1)(a) of the IRPA, the affected individual's focus must necessarily be on the section 44(1) report or the decision of a Minister's delegate and the delegate's limited discretion to refer the individual to an admissibility hearing.

[23] Justice Bell of this Court recently considered an application for judicial review involving the three decisions referred to by Justice de Montigny (*Chambers v Canada (Citizenship and Immigration)*, 2016 FC 1407 (*Chambers*)). The respondent in *Chambers* raised a preliminary issue as to whether the applicant could challenge the three decisions in one application for judicial review. Justice Bell saw no reason for requiring three separate applications and stated (*Chambers* at para 3):

> Only one application for judicial review of the three section 44 decisions is necessary, because an applicant will not know of the need to challenge the decisions until a removal order has been made by the ID. Also, one application results in significant savings in time, litigation costs and judicial resources.

[24] In my view, whether an applicant proceeds by way of one application for judicial review (as in *Chambers*) or by way of separate applications for judicial review of two (as in the present case) or all three of the section 44 decisions is not determinative. If either or both of the subsection 44(1) and 44(2) decisions are quashed by this Court, the ultimate decision by the ID removing an applicant should not stand (see *Hernandez v Canada (Minister of Citizenship and Immigration*), 2005 FC 429 at para 5).

V. Issues

[25] The Applicant raises a number of issues in this application, which I have organized as follows:

1. Did the CBSA Officer breach the Applicant's right to know the case against him and to be provided a meaningful opportunity to respond by relying only on the victim's statement in respect of the 2016 Conviction and by failing to obtain or consider the agreed statement of facts presented by the Crown in the Applicant's sentencing hearing?

2. Was the Referral Decision unreasonable as the Minister's Delegate: (a) relied on withdrawn charges against the Applicant without any consideration of the evidence underlying the withdrawn charges; (b) failed to consider all of the evidence regarding the Applicant's 2016 Conviction; and (c) drew a negative inference from the fact that the Applicant was not granted bail pending trial without considering the reasons for which bail was not granted?

VI. Standard of Review

[26] The issue of procedural fairness raised by the Applicant will be reviewed for correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-56 (*Canadian Pacific*); see also *Chen v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1395 at para 9; *Apolinario v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1287 at para 23). The review focuses on the procedures followed in arriving at a decision and not on the substance or merits of the case in question. I must assess whether the process followed by the Minister's Delegate in making the Referral Decision was just and fair having regard to all of the Applicant's circumstances, the substantive rights at stake and the other contextual factors identified by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-28 (*Canadian Pacific* at para 54):

> [54] A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the Baker factors. A reviewing court does that which reviewing courts have done since Nicholson; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. I agree with Caldwell J.A.'s observation in Eagle's Nest (at para. 21) that, even though there is awkwardness in the use of the terminology, this reviewing exercise is "best reflected in the correctness standard" even though, strictly speaking, no standard of review is being applied.

[27] The standard of review applicable to a decision by a Minister's delegate pursuant to subsection 44(2) of the IRPA is reasonableness (*Canada (Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237 (*Tran*) at paras 22 and 31; *Valdez v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 377 at para 18).

VII. Analysis

1. *Did the CBSA Officer breach the Applicant's right to know the case against him and to be provided a meaningful opportunity to respond by relying only on the victim's statement in respect of the 2016 Conviction and by failing to obtain or consider the agreed statement of facts presented by the Crown in the Applicant's sentencing hearing?*

[28] Upon receipt of the Certified Tribunal Record, the Applicant became aware that the transcript (Transcript) of his sentencing hearing for the 2016 Conviction had not been before either the CBSA Officer when formulating the CBSA Recommendation or the Minister's Delegate when making the Referral Decision. Rather, the CBSA Officer relied solely on the victim's statement to the responding police officer in assessing the circumstances of the 2016 Conviction. The Transcript set forth the agreed facts relied upon by the Crown and

presented to the Ontario Superior Court of Justice (Ontario Court) regarding one charge of sexual assault against the Applicant.

[29] Notwithstanding the September 29, 2016 CBSA letter which provided him the opportunity to make written submissions, the Applicant argues that he had no way of knowing that the CBSA Officer would rely on an incomplete evidentiary record in arriving at her recommendation. He could not foresee the necessity to provide the Transcript which supported his explanation of the circumstances of the 2016 Conviction. Therefore, his right to procedural fairness was breached as he was not provided an opportunity to know the case against him and to provide meaningful submissions.

[30] The Respondent counters, stating that the Applicant had the opportunity to attach the Transcript to his written submissions but chose not to do so. The Respondent submits that it was foreseeable that the CBSA Officer would consider the content of the criminal complaint lodged by the victim in assessing the Applicant's 2016 Conviction.

[31] I agree with the Respondent insofar as it was reasonably foreseeable that the CBSA Officer would consider the content of the criminal complaint against the Applicant in making the CBSA Recommendation to the Minister's Delegate, including the victim's statement to the responding officer. However, it was not reasonably foreseeable that the CBSA Officer and the Minister's Delegate would fail to consider all of the relevant evidence pertaining to the 2016 Conviction. The Transcript was a material part of that evidence. If the CBSA Officer

intended to proceed solely on the basis of the victim's statement, she had an obligation to inform the Applicant. Her failure to do so was a breach of the Applicant's right to procedural fairness.

[32] The decision under review in this application is the Referral Decision of the Minister's Delegate. However, the initial breach of procedural fairness in the preparation of the CBSA Recommendation permeates the Referral Decision as the Minister's Delegate relied on the CBSA Recommendation. I find that the process followed by the CBSA Officer and the Minister's Delegate was not fair having regard to the Applicant's circumstances, particularly his substantive rights at stake. He could not have anticipated that the statement of facts before the Ontario Court and upon which his sentence was pronounced was not before the CBSA Officer or, consequently, the Minister's Delegate. The Applicant's ability to address the case against him was compromised. That being said, I impute no actual intention on the part of the CBSA Officer to improperly rely on one version of the events in question, nor do I take issue with the Respondent's characterization of the very limited duty of fairness owed to the Applicant in the subsection 44(2) process (*Huang v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 28 at paras 84-86).

[33] The concepts of procedural fairness and reasonableness of the Referral Decision parallel each other in this respect. The Applicant's arguments regarding the CBSA Officer's failure to consider relevant evidence can also be considered in the context of the reasonableness of the Referral Decision. The Transcript was readily available and obviously relevant to the subsection 44(2) analysis. It was not reasonable for the CBSA Officer to make a recommendation to the Minister's Delegate without reference to the full evidentiary record of the

Applicant's 2016 Conviction. As a result, the Referral Decision of the Minister's Delegate, based on the flawed CBSA Recommendation, was equally unreasonable.

[34] The CBSA Recommendation relied on the victim's description of the events underlying the Applicant's 2016 Conviction. The victim's report, made by a 15 year old girl, was compelling. The CBSA Officer set forth the details of the assault as related by the victim in Section 5 (Circumstances of Allegation(s)) and returned to the victim's statement to the responding officer in Section 8 (Potential for Rehabilitation). The victim spoke to feeling compelled to enter the Applicant's vehicle and to details of the sexual assault, including the number of times the Applicant forced the victim to participate in sexual acts while in the vehicle.

[35] In the Applicant's Memorandum of Fact and Law submitted in support of this application, he set out the facts relied upon by counsel for the Crown in his submissions on sentencing. These reasons are taken from the Transcript which is contained in the Application Record. The facts presented by Crown counsel to the Ontario Court differed from those set out in the victim's statement. The agreed facts stated that the victim entered the Applicant's car after a brief conversation and recounted one sexual act. In my opinion, the CBSA Officer had an obligation to consider the differences between the two descriptions of the incident and to indicate in the CBSA Recommendation the role the two different accounts played in her consideration of the nature of the allegations against the Applicant and his potential for rehabilitation.

[36] The Minister's Delegate wrote in Section 11 of the CBSA Recommendation that she concurred with the CBSA Officer's narrative and that the Applicant had engaged in predatory behaviour. It is clear that the Minister's Delegate relied on the CBSA Recommendation and the facts as recounted by the CBSA Officer. There is no evidence that the Minister's Delegate reviewed any evidence that was not before the CBSA Officer. There is no discussion in the Referral Decision, or in the handwritten notes of the Minister's Delegate in the CBSA Recommendation, of the facts set out in the Transcript. In the absence of a discussion of the differing descriptions of the factual circumstances of the allegations against the Applicant, neither the CBSA Recommendation nor the Referral Decision was transparent and intelligible (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[37] In light of my findings regarding the failure by the CBSA Officer and the Minister's Delegate to consider the Applicant's 2016 Conviction based on a full evidentiary record, I will not address the Applicant's remaining arguments regarding the reasonableness of the Referral Decision. However, I caution the officers involved in the redetermination of the Referral Decision that a consideration of withdrawn criminal charges against an individual without consideration of the evidence underlying those charges has been found by this Court to be a reviewable error (*Hutchinson v Canada (Citizenship and Immigration)*, 2018 FC 441 at paras 22-27; see also *Tran* at paras 89-91).

VIII. Conclusion

[38] The application for judicial review of the Referral Decision will be allowed. Consequently, the Admissibility Decision cannot stand and the application for judicial review of the Admissibility Decision will also be allowed.

[39] No question for certification was proposed by the parties and none arises in these applications.

JUDGMENT in IMM-4523-17 AND IMM-4939-17

THIS COURT'S JUDGMENT is that:

1. The style of cause for each application is amended to name the Minister of Public Safety and Emergency Preparedness as the Respondent.
2. The application for judicial review of the decision of a Minister's Delegate dated July 20, 2017 to refer the Applicant for an admissibility hearing before the Immigration Division (ID) of the Immigration and Refugee Board pursuant to subsection 44(2) of the IRPA is allowed (IMM-4523-17).
3. The decision of the Minister's Delegate is set aside and the matter is remitted for redetermination.
4. The application for judicial review of the decision of the ID dated November 15, 2017 to issue a deportation order to the Applicant in reliance on paragraph 36(1)(a) of the IRPA is also allowed (IMM-4939-17).
5. The decision of the ID is set aside. The matter is not remitted for redetermination at this time as the necessity for an admissibility hearing will depend on the result of the redetermination referred to in paragraph 3 of this Order.
6. A copy of this Judgment and Reasons will be placed on both Court files (IMM-4523-17 and IMM-4939-17).
7. No question of general importance is certified.

"Elizabeth Walker"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4523-17
STYLE OF CAUSE:	SHAZAD ABDUL v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND DOCKET:	IMM-4939-17
STYLE OF CAUSE:	SHAZAD ABDUL v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
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