Federal Court  Cour fédérale

Date: 20190212

Docket: IMM-3404-18

Citation: 2019 FC 174

Ottawa, Ontario, February 12, 2019

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

TIMOTHY DURKIN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Mr. Timothy Durkin is a long-standing permanent resident of Canada who holds British citizenship. He is presently facing the prospect of a hearing before the Immigration Division to determine whether he is inadmissible to Canada by virtue of s 36(1)(c) or s 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Mr. Durkin's Canadian immigration status is in jeopardy because, in 2013, he was indicted by a Grand Jury in Alabama, along with three others, for an alleged conspiracy to commit securities and wire fraud. Based on these allegations of criminality, the Canada Border Services Agency [CBSA] initiated the process of an admissibility review under s 44 of the IRPA. The process began with the preparation by a CBSA Officer [Officer] of a report under s 44(1) of the IRPA offering the opinion that there were reasonable grounds to believe that Mr. Durkin was inadmissible to Canada on the ground of organized criminality.

[3] On November 28, 2017, Mr. Durkin was served with a notice advising him that he was the subject of an admissibility review "because of the offences committed from October 2009 to May 2013 in Alabama…contrary to sections 18, 371, 15, 77q, 1343 and 2 of the US Code". Mr. Durkin was invited to provide a written submission providing reasons why a removal order should not be sought, including details about his personal circumstances and the alleged criminal history.

[4] Mr. Durkin retained legal counsel who, by letter dated December 6, 2017, requested a 60-day extension to provide submissions. Counsel also asked for information concerning the allegations of criminality. The CBSA agreed to an extension to February 13, 2018.

[5] At the same time, Mr. Durkin's counsel made an Access to Information and Privacy [ATIP] request to the CBSA seeking all relevant records. Because of the anticipated delay in obtaining an ATIP response, counsel requested a further 60-day extension. That extension was granted.

[6] On March 29, 2018, counsel requested an additional extension to July 5, 2018 based on the CBSA's failure to respond to the ATIP request and due to the absence of responses to information requests made to sources in the United States. The CBSA granted a further extension to April 28, 2018.

[7] On April 23, 2018, Mr. Durkin's counsel wrote to the CBSA acknowledging receipt of the CBSA's ATIP response and sought a further 30-day extension to file submissions. That letter indicated that a response would be forthcoming notwithstanding an asserted inability to obtain information from United States sources.

[8] On May 8, 2018, Mr. Durkin's counsel made a nine-page submission to the CBSA requesting that an inadmissibility report not be issued against Mr. Durkin. Included in the submission was a complaint about the failure by the CBSA to disclose any information about the outstanding criminal charges. This information was demanded on the basis of procedural fairness along with a request for another extension to accommodate its production. Much of the remainder of counsel's submission was taken up with humanitarian and hardship considerations but it also contained the following assertions concerning the United States charges:

> 19. Mr. Durkin has never been convicted of any criminal offence in his entire life. While CBSA has observed in the s. 44 report notes that charges have been laid against a Mr. Durkin in Alabama, in May, 2013 relating to securities and wire fraud, we submit the proper forum for justice to be pursued, to determine if these charges are well founded, would be through the United States criminal process and the Canada-US extradition treaties. It is not clear if the US authorities have made any efforts to locate or extradite Mr. Durkin, but we note that Mr. Durkin has never sought to evade prosecution – he notes that the last time he sought

> to enter the US was around 2012, but his entry was denied for not having the proper visa.
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> 20. At age 67, Mr. Durkin is also adamant that these charges are not well founded. He never knowingly, willfully or blindly assisted in any unlawful scheme to defraud others through their investments. There is no evidence that shows Mr. Durkin knew about the activities of the other individuals charged, that he acted in concert with them, that he perpetrated fraud, or that he was involved in organized criminal activities or a pattern of offending.
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> 21. At age 67, Mr. Durkin has no other or previous criminal history. The events underlying this sole charge at issue allegedly occurred between 2009 and 2012 – now over 6 years ago. We submit that given his age, his history, establishment, and reputable background, Mr. Durkin poses no risk of offending in the future. He lives a stable and quiet life with his family in Sooke, BC, where he runs a successful business that is of significant benefit to his community. A section 44 report and referral is not necessary to promote and protect the security of Canada.
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> 22. The Federal Court has accepted that an absence of offending over a long period of time is a factor to consider as strong evidence which indicates that the risks of offending are minimal (or in this case, non-existent): *Thamber v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 177. This factor is important to consider when balancing the safety of Canadians against the particular circumstances of an individual who may have committed an offence, as described in *Hernandez.*

[9] Included with counsel's submission was a seven-page letter from Mr. Durkin describing in considerable detail his personal history up to 2018 but bearing a notable gap between 2009 and 2013. Mr. Durkin's only reference to the criminal allegations was the following:

> I have never been convicted of any [*sic*] of any crime in my life. I can say unequivocally that I have never participated in or had any knowledge of any fraudulent activities or schemes to defraud others of their investments.

> I ask you to please consider my history, my background, the best interests and well-being of my family, the extreme hardships we would face if I could not stay here, and the information before you on any allegations that have been made against me with, [*sic*] with a fair and cautious view as to the reliability or well-foundedness of that information, and I ask you not to refer a report against me.

[10] On June 1, 2018, the Officer prepared a s 44(1) Highlights Report for consideration by the Minister's Delegate [Delegate]. That report summarized the evidence including Mr. Durkin's submissions and some of the details of the criminal allegations. The Officer also noted but dismissed Mr. Durkin's complaint about a lack of disclosure on the basis that full disclosure would be made at a later point in the process. The Officer concluded with a recommendation that Mr. Durkin be referred for an admissibility hearing.

[11] The Highlights Report was next considered by the Delegate in accordance with s 44(2) of the IRPA. The Delegate had several pieces of evidence concerning the criminal allegations against Mr. Durkin including the indictment, some Federal Bureau of Investigation [FBI] testimony to the Grand Jury, an arrest warrant and an Interpol Red Notice seeking Mr. Durkin's arrest. The Delegate considered the evidence, including Mr. Durkin's denial of criminal conduct, and came to the following conclusion:

> Based upon my review of all available information, I find that there are considerable humanitarian and compassionate grounds in Mr. Durkin's favour. Having said that, the offences Mr. Durkin is accused of are organized, sophisticated and serious in nature. Though Mr. Durkin has been a permanent resident in Canada for 66 years, much of that time was spent outside of Canada including in his country of citizenship. Upon review, I do not believe that the humanitarian and compassionate considerations outweigh the seriousness of the offences and Canada's international obligation not to be a haven for fugitives from justice. As such, I concur with the officer's recommendation to refer Mr. Durkin to an admissibility hearing.

[12] It is common ground that the Delegate relied, in part, on several documents obtained from United States law enforcement sources outlining the particulars of the criminal case against Mr. Durkin. It is also clear from the record before me that those same documents were withheld from Mr. Durkin and his counsel on the basis that their disclosure was not required at that point in the admissibility process. Of course, those documents have now been disclosed and form part of the record in this proceeding.

[13] Mr. Durkin's complaint is that when he was invited by the CBSA to make a submission as to why his case should not be referred for an admissibility hearing, he was unaware of the full case against him. He had asked for particulars concerning the outstanding criminal charges and had made an ATIP request seeking that information but it was deliberately withheld. This failure to disclose material evidence, it is argued, is a breach of procedural fairness and requires that the Delegate's decision be set aside. The standard of review for this issue is correctness.

[14] I accept Mr. Durkin's point that a duty of fairness applies to the process described in s 44 of the IRPA such that an appropriate level of disclosure is required. For a permanent resident with substantial ties to Canada, the scope of available discretion under these provisions may also be somewhat broader than that for a foreign national and can give rise to a heightened level of procedural fairness: see *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 at paras 23 and 24, [2017] 3 FCR 492 [*Sharma*].

[15] An important aspect of the duty of fairness involves the right to meaningful participation, meaning the opportunity to fully and fairly present one's case to the decision-maker: see *Baker v*

Canada (Minister of Citizenship and Immigration), 1999 SCC 699 at para 30, [1999] 2 SCR 817. The scope of participation may vary from one process to another but foundationally it requires a party to know the essential details of the case to be met and the right to challenge that case. In many cases this will require some disclosure.

[16] In *Sharma*, above, the Court discussed the fairness parameters applying to the first stage of the process under s 44 of the IRPA as follows:

> 33 The case review of recommendations prior to the public danger opinion or the internal risk opinion triggered by a humanitarian application are of a different nature and cannot be analogized to the report and the referral envisaged by subsections 44(1) and (2). I agree with the respondent that the inadmissibility report and the case highlights are more in the nature of *pro forma* documents, whose essential purpose is to list relevant information from the file (revolving around the criminal conviction and related objective facts) and to provide a brief rationale for the officer's actions and recommendation. They are clearly distinguishable from case review recommendations in the context of public danger opinion and internal risk opinions, which are more akin to advocacy tools.
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> 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 subsection 44(2) referral to the ID. 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 [page511] 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. As emphasized by Justice L'Heureux-Dubé in *Baker* [at paragraph 22]:
>
> > .... underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and

> open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[17] In *Sharma*, the Applicant had demanded production of the Highlights Report that had been sent to the Delegate. The refusal to provide it was upheld because the Applicant was already aware of the case to be met and had answered it. He was, therefore, not entitled to a "second kick at the can": see para 30. It follows from this and from the rationale underlying the duty to disclose that a decision-maker is not obliged to disclose information that a party already knows. In *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, [2005] FCJ No 533, the same point is made by Justice Judith Snider at para 71:

> [71] Implicit in this duty is, in my view, a requirement that the person being interviewed by an immigration officer is informed of the purpose of that interview so that he may make meaningful submissions. Further, I would think that the duty of fairness would require the immigration officer put to the interviewee any information he has that the interviewee would not reasonably be expected to have. A further implication is that the person should be offered the opportunity to have counsel present at any interview or to assist him in preparing written submissions. All of this is part of what CIC has acknowledged is required for the person to "fully understand both the case against them and the nature and purpose of the report". [Emphasis added.]

[18] What I take from these authorities is that a party can only demand disclosure where the information sought is material and otherwise unknown and unavailable.

[19] Mr. Durkin contends that his participatory rights were infringed because the CBSA refused to provide him with information in its possession outlining the United States criminal

allegations. This, he says, prevented him from knowing the case to be met in the context of the exercise of the Delegate's discretion to decline to refer his case to the Immigration Division. According to Mr. Durkin's counsel, they were compelled to respond "blindly" to that part of the case.

[20] For the sake of argument, I accept Mr. Durkin's point that the CBSA had a duty to inform him of information it possessed, provided that he needed to know it to make a meaningful submission to the Delegate. The fundamental question that remains is whether Mr. Durkin has established that he lacked sufficient knowledge to respond to the allegations made against him by United States law enforcement authorities in 2013.

[21] At a minimum, Mr. Durkin knew in November 2017, that the admissibility process had been initiated because of the United States criminal charges brought against him in 2013 concerning allegations of securities fraud committed between October 2009 and May 2013 in the State of Alabama. On this application, he says he needed to know more and that the CBSA could have given him those details – at least in the form or content of the documents it possessed.

[22] The record filed in this proceeding includes a considerable amount of information particularizing the United States criminal allegations made against Mr. Durkin and his three business associates. For instance, the indictments that were handed down on May 30, 2013 by a Grand Jury sitting in Mobile, Alabama, included the following allegations:

> 6. From in or about October 2009, through the date of the return of this Indictment, **SENCAN**, **PETERSEN**, **MERRY** and

> **DURKIN**, aided and abetted by each other, perpetrated a scheme to default Ramco / Westover investors across the United States, and in Mobile and Baldwin County, Alabama in particular, by accepting millions of dollars of investor funds under false pretenses, failing to invest the funds as promised and creating and disseminating false documents to investors purporting to show that their funds had been invested and that they were recognizing continual profits on their investments.

[23] Accordingly to FBI testimony given to the Grand Jury, Mr. Durkin was, at the time, the owner or managing partner of Westover.

[24] A warrant for Mr. Durkin's arrest was issued on June 6, 2013 out of the United States District Court but it was not executed. An Interpol Red Notice was issued on April 16, 2014 seeking Mr. Durkin's apprehension as a "fugitive wanted for prosecution". The Red Notice described the case against him in the following way:

> From about October 2009 to May 2013, in Alabama and elsewhere, Timothy DURKIN and others solicited about $4.9 million USD from customers for the alleged purpose of investing in a high speed computerized arbitrage trading system. DURKIN and others provided false representations to victims via email, including alleging that the fund's principal financier was a wealthy businessman, that computers were in place to execute the necessary rapid trades under the arbitrage model, and that trading losses would be capped at $5,000 USD per day. DURKIN and others failed to invest the victims' funds as promised, and used the money instead for their own personal expenses, and to make Ponzi scheme type payments to earlier investors. DURKIN and others are specifically charged with using wire communications on 18 occasions to further their scheme, including seven emails to victim investors, and 11 wire transfers totalling $1,589,000 USD from victims' accounts to accounts controlled by DURKIN and others.

[25] Other information before me discloses that the three individuals jointly charged with Mr. Durkin were tried, convicted and sentenced to five-year prison terms. Their joint appeal to the United States Court of Appeals was dismissed in a written decision dated October 23, 2015. Because Mr. Durkin was not a party to the appeal, he is the subject of only passing reference in the decision. Nevertheless, the fraud is described in considerable detail beginning with its characterization as a "classic Ponzi scheme" operating for three years and involving the theft of almost five million dollars in United States funds. The appeal decision also referred to Mr. Durkin as having "absconded" and "fled the country".

[26] Mr. Durkin bears the onus of proof on this application to show that he was treated unfairly and denied the right to know and answer the case being made against him to the Delegate. On the evidence he has presented he has clearly not established that he lacked the information necessary to answer the evidence of inadmissibility held by CBSA. Indeed, the evidence presented by Mr. Durkin is more significant for what it fails to address than for its content. Notably, his affidavit does not assert that he was unaware before 2017 of the outstanding criminal charges in the United States nor does he say that he was, at the relevant time, unaware of the substance of the allegations against him. He also offers no substantive evidence to distance himself from the three associates who were jointly indicted with him and who were ultimately convicted and sentenced to lengthy prison terms. He is similarly silent as to how he could possibly have remained unaware of the criminal prosecution of the three co-accused including the final disposition of their cases. These were, after all, public proceedings that took place over a number of years.

[27] It may be a coincidence that Mr. Durkin returned to Canada just a few weeks before the United States indictments were issued. However, he does not assert that he was unaware of the ongoing FBI investigation before he left or of the fact that a warrant had been issued for his arrest.

[28] Mr. Durkin's submissions to the CBSA were similarly circumspect. Despite providing a detailed description of much of his business history, no information was offered for the period between 2009 and 2013 when it is alleged he participated in a substantial fraud. The extent of his attempt at exculpation to the Delegate was the following:

> I have never been convicted of any crime in my life. I can say unequivocally that I have never participated in or had any knowledge of any fraudulent activities or schemes to defraud others of their investments.
>
> …
>
> I ask you to please consider my history, my background, the best interests and well-being of my family, the extreme hardships we would face if I could not stay here, and the information before you on any allegations that have been made against me with, [*sic*] with a fair and cautious view as to the reliability or well-foundedness of that information, and I ask you not to refer a report against me.

[29] It strikes me as implausible that Mr. Durkin needed any information from the CBSA to understand the scope and nature of the criminal case against him. Even if he was not privy to this information as events were unfolding (a doubtful proposition at best), much of the information he says he needed would have been publicly available – most notably the decision of the United States Court of Appeals involving the three co-accused. Simple queries to obvious sources in Alabama would also have produced what he says he needed.

[30] In the absence of clear and unequivocal evidence from Mr. Durkin that he was honestly unaware of the substance of the criminal allegations against him and his convicted associates, I draw an inference that he knew full well (or had the means to know) about that aspect of the CBSA's case. I do not accept his argument that he was blind to that evidence; and, even if he was, it was a case of strategic willful blindness. In either situation, the CBSA owed him no duty of additional disclosure.

[31] Notwithstanding this outcome, I question the CBSA's seemingly dogmatic position concerning disclosure of its case. If nothing else, the refusal to disclose relevant and available information for no good reason leads to unnecessary delays and applications like this one. In other cases, a breach of procedural fairness may occur: see, for example *AB v Canada (Citizenship and Immigration)*, 2013 FC 134 at para 66, [2013] FCJ No 166.

[32] The stated rationale for the refusal to disclose the United States law enforcement material to Mr. Durkin was that he would be entitled to later disclosure in the context of an admissibility hearing. This misses the point. The invitation to a person involved in the s 44 process to provide submissions is for the purpose of possibly avoiding a referral for an admissibility hearing. This is also the only point in the process that a person can call upon the Delegate for leniency notwithstanding the person's technical inadmissibility. At the later point of an admissibility hearing the only open issue is whether the grounds for establishing inadmissibility have been established. Accordingly, in a situation where disclosure is actually needed to support a claim for leniency to the Delegate, the duty of fairness may require it.

[33] At the close of argument, I left open the possibility of certified questions. Mr. Durkin will have seven days to propose a question and the Minister will have seven days thereafter to respond. Subject to the Court remaining seized of the case on that remaining point, the application is dismissed.

JUDGMENT

THIS COURT'S ADJUDICATES that this application is dismissed but subject to the final determination of any certified question proposed by the Applicant.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3404-18
STYLE OF CAUSE:	TIMOTHY DURKIN v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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