Federal Court  Cour fédérale

Date: 20190705

Docket: IMM-5856-18

Citation: 2019 FC 894

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 5, 2019

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

GERRY MAKOMENA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the Minister's opinion, provided in accordance with paragraph 115(2)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [the Act]. The application for judicial review itself has been filed pursuant to section 72 of the Act.

[2] Mr. Makomena entered Canada on December 8, 1998. He immediately claimed refugee protection as a result of the treatment he had been subject to in his country of origin, the Democratic Republic of the Congo. He was granted refugee status on June 8, 1999. A few months later, he applied for permanent residence in Canada, but never obtained it. He now faces the consequences of the opinion issued pursuant to paragraph 115(2)(a) if the opinion is upheld.

I. Statutory Provisions

[3] Mr. Makomena was convicted on three occasions during the years he spent in Canada of criminal offences, all of which are punishable by at least 10 years of imprisonment. Such offences carry with them a finding of inadmissibility to Canada on grounds of serious criminality. Subsection 36(1) of the Act reads as follows:

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36 (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	**a)** être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
…	**[…]**

[4] Despite the fact that a person has been granted refugee protection, it is possible to return that person to their country of nationality if the Minister finds that the person is a danger to the

public in Canada where that refugee is inadmissible on grounds of serious criminality. In this case, the relevant provisions are subsections 115(1) and 115(2) of the Act. They read as follows:

115 (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	**115 (1)** Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.
(2) Subsection (1) does not apply in the case of a person	**(2)** Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or	**a)** pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.	**b)** pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

Serious criminality does not suffice. The Minister must also be of the opinion that the person is a danger to the public.

[5] The Minister, after having notified the applicant of his intention of issuing an opinion pursuant to paragraph 115(2)(a) and having received submissions from Mr. Makomena, effectively provided the said opinion by means of his delegate on August 31, 2018.

[6] At the outset, the decision notes that the United Nations Convention Relating to the Status of Refugees [the Convention] provides for the possibility of refoulement of refugees. Subsection 33(2) states:

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.	2. Le bénéfice de la présente disposition ne pourra toutefois être invoqué par un réfugié qu'il y aura des raisons sérieuses de considérer comme un danger pour la sécurité du pays où il se trouve ou qui, ayant été l'objet d'une condamnation définitive pour un crime ou délit particulièrement grave, constitue une menace pour la communauté dudit pays.

In any event, it is the wording of the Canadian provision that is subject to interpretation and application in this case.

II. The Facts

[7] The serious criminal offences that resulted in Mr. Makomena’s inadmissibility were committed on three occasions. First, offences were committed in Montreal on August 1st and 3rd, 2000. Thus, he procured goods through fraud or making false pretenses on two occasions. On the first occasion, on August 1st, is was in the amount of $11,395. Two days later, it was for

an amount of $5,256.54. These are offences set out in sections 362(1)(b) and (3) of the *Criminal Code*, R.S.C. (1985), c. C-46. On each occasion, he used a document he knew to be a forgery, consisting of a driver's licence in the name of a person who was not the applicant, and he sought to pass this driver's licence off as genuine, thereby committing the offence set out in sections 368(1)(a) and (c) of the *Criminal Code*.

[8] Ultimately, he was convicted of using a credit card he knew to have been obtained, made, or altered by the commission of an offence. This is an offence under sections 342(1)(c) and (e) of the *Criminal Code*. With respect to these offences, the applicant readily acknowledged being part of a Congolese organization whose goal was to procure furniture for themselves or for resale. He indicated at the time that he had committed the offences strictly out of necessity. He did not know how the co-accused had obtained the credit cards or driver's licence. In addition, it was he himself who had posed as a buyer of the goods at two different businesses.

[9] On a second occasion, the applicant was convicted of possession of property obtained through crime, which is the offence set out in section 354(1)(a) of the *Criminal Code.* In that case, the offences had been committed in Quebec City and consisted in the possession of gift certificates and various other items with a value in excess of $5,000 knowing that these items had been obtained through the commission in Canada of an indictable offence. Between January 22, 2004, and February 5, 2004, Mr. Makomena went to the Galeries de la Capitale to collect gift certificates that had been purchased with credit cards. He was arrested in February 2004 along with two other suspects. The purchases totalled $17,000 in gift certificates.

[10] In the case of the initial offences committed in Montreal and Quebec City, he received a conditional sentence of nine months' imprisonment, followed by two years of probation without surveillance for the first offence, while for the second offence, he received a conditional six-month sentence with two years of probation, but with $2,000 in restitution to be paid.

[11] The third offence consisted of fraud committed in Trois-Rivières in between October 2, 2012, and January 23, 2013, when, by deceit, falsehood or other fraudulent means, the applicant defrauded a travel agency of an amount in excess of $5,000. In addition, he was found guilty of having used data enabling the use of a credit card or the procurement of services related to the use of that credit card. That is an offence set out in section 342(3)(a) of the *Criminal Code*. That time, for the commission of this offence, he was sentenced to a term of imprisonment. Thus, he received a sentence of six months less a day and three years' probation with one year of surveillance added to the term of imprisonment. In addition, $3,000 in restitution was to be paid to the victim of the offence.

[12] Mr. Makomena was subject to a removal order following his first conviction, which led to his being declared inadmissible to Canada under paragraph 36(1)(a) of the Act. A second report under subsection 44(1) of the Act was produced for the offences committed in 2005. It then naturally followed that the application for permanent residence filed in November 1999 was dismissed. A third report under subsection 44(1) was drafted for the offence committed in 2015, however, this time the Minister chose to notify Mr. Makomena of his intention of considering issuing an opinion under paragraph 115(2)(a) as of August 28, 2017.

III. The Decision for Which Judicial Review is Sought

[13] As we can see from reading section 115 of the Act, refoulement to a country in which a person risks persecution within the meaning of section 96, torture or cruel and unusual treatment or punishment for an individual who is recognized as a refugee or person in need of protection is prohibited under Canadian law (and international law for that matter). Mr. Makomena was granted refugee status in June 1999. He therefore benefits from subsection 115(1) of the Act.

[14] But the principle of non-refoulement has its limits. Also provided for under the Act, paragraph 115(2)(a) requires that two conditions be met for the principle of non-refoulement not to apply. There must be inadmissibility on grounds of serious criminality, which is the case here, and the Minister must be of the opinion that the person poses a danger to the public in Canada. The decision for which judicial review is sought turns on that issue.

[15] The decision-maker adds to what is required under the Act the obligation arising from the case law to consider, to the extent that he finds that Mr. Makomena poses a danger to the public in Canada, the risk that remains in the Democratic Republic of the Congo as opposed to the danger he would pose if he was to remain in Canada. It is a review of proportionality. If the danger to Canada posed by the person is greater than the risk to which the applicant would be exposed in his country of nationality, the applicant may then be sent back. Humanitarian and compassionate considerations will also be taken into account. This analysis superimposed on the wording of section 115 of the Act originates from *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3, so as to not infringe section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c 11).

[16] Essentially, the following factors were pointed out to the decision-maker: the non-violent nature of the offences committed by the applicant, the sentences handed down which suggest a highly relative level of seriousness, the amounts of which the merchants were defrauded and the fact that the last offence dated back five years. Emphasis was placed on the criminological assessment from December 22, 2017, in which it was indicated that Mr. Makomena's incarceration had had an effect on him. There was a low risk of reoffending and the applicant had rehabilitated himself.

[17] The issue obviously turns on what "a danger to the public in Canada" means. For the decision-maker, this means [TRANSLATION] "determining whether there is sufficient evidence to make the decision that he is a possible re-offender whose presence in Canada creates an unacceptable risk to the public." (Decision, p. 9 of 17). Relying on *Ramanathan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 834, the decision-maker agrees that economic crimes are not excluded from the application of section 115.

[18] The decision-maker considers that the coordination in the organization of the offences increases [TRANSLATION] "the subject's level of dangerousness": but he does not say why. Furthermore, the decision-maker notes that the fraud committed involved considerable amounts of money and had impacted several victims. The decision-maker also takes issue with the applicant for having re-offended a third time, after having received relatively mild sentences before having to serve a term of imprisonment. Thus, he declares himself to be unsatisfied that the applicant has rehabilitated himself; in his view, if the applicant has shown that he is now

making efforts, it is as a result of his fear of being removed from Canada. The decision-maker concludes that the applicant poses a danger to the public in Canada in the following words:

> [TRANSLATION]
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> Based on the evidence before me that Mr. Makomena's criminal activities were both serious and dangerous to the public, in addition to the lack of evidence showing rehabilitation as well as a significant risk of re-offending as shown earlier, this leads me to find that, on a balance of probabilities, I am satisfied that Mr. Makomena currently poses, and will in the future pose a risk to the public in Canada.
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> [Decision, p. 11 of 17.]

[19] The decision-maker then examined the risk the applicant would face were he to return to his country of nationality: is there a risk of persecution, a risk to his life or risk of torture or of cruel and unusual treatment (or punishment)?

[20] Mr. Makomena had taken in a Rwandan family at the end of the 1990s, which had caused him great difficulties from which he ultimately fled, leading him to eventually end up in Canada. For the decision-maker, these links to Rwandans no longer pose a risk, 20 years later. The fact that the applicant's father had had close ties to the regime of President Mobutu no longer poses a risk now that he is not in power. In fact, the applicant has not been politically active and does not appear to have taken a position against the current government.

[21] If it can be agreed upon that Congolese citizens returning to their country will be questioned by the local authorities, the documentary evidence indicates that Congolese nationals returning to the returning to the country are not subject to mistreatment. A single case of

detention (of fewer than 24 hours) was reported according to the documentary evidence. This leads to the conclusion that Mr. Makomena does not possess the personal characteristics to fear for his safety. The documentary evidence supports this finding.

[22] We must therefore consider whether there are humanitarian and compassionate grounds to prevent Mr. Makomena from being returned to his country of origin.

[23] The applicant cites the presence of his daughter, who was born in Canada in 2000, as well as the adoption of his niece. But this situation carries relatively little weight according to the Federal Court of Appeal in *Lewis v Canada (Public Safety and Emergency Preparedness)*, [2018] 2 FCR 229, 2017 FCA 130 :

> [74] In light of the foregoing, I disagree with Mr. Lewis and the intervener that *Kanthasamy* requires that a full-blown best interests of the child analysis be undertaken before a child's parent(s) may be removed from Canada or that such children's best interests must outweigh other considerations in the analysis. In my view, the holding in *Kanthasamy* applies only to H&C decisions made under section 25 of the IRPA and, even there, does not mandate that the affected children's best interests must necessarily be the priority consideration.

The family relationship could continue on a long-distance basis. The health issues (high blood pressure) and emotional distress do not warrant avoiding removal. This led to the decision-maker finding that:

> [TRANSLATION]
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> In light of Mr. Makomena's criminal activities and his moderate level of establishment, I am not of the view that his separation from members of his immediate family, including his 17-year old daughter and friends, support an exceptional remedy.

> Having analyzed Mr. Makomena's personal situation, I find that there are insufficient humanitarian and compassionate grounds such as the level of establishment in Canada, in both social and economic terms, including the best interests of the child, that would lead me to conclude that his return to the Democratic Republic of the Congo should be prevented on the basis of sufficient humanitarian and compassionate grounds.
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> [Decision, p. 16 of 17.]

[24] Ultimately, subsection 115(2) applies to this case in light of the applicant's serious criminality and the danger he poses to the public in Canada.

IV. Standard of Review

[25] The applicable standard of review for such cases has been recognized on numerous occasions as being reasonableness (*Cheikh v Canada (Citizenship and Immigration)*, 2017 FC 896; *Reynosa v Canada (Citizenship and Immigration)*, 2016 FC 1058; *Omar v Canada (Citizenship and Immigration)*; 2013 FC 23; *Derisca v Canada (Citizenship and Immigration)*, 2013 FC 524; *Alkhalil v Canada (Citizenship and Immigration)*, 2011 FC 976). This means that the Court must show deference to the decision taken. As it is set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, 2008 1 SCR 190 [*Dunsmuir*], the decision under review must be within the realm of reasonableness. Thus, reasonableness will be concerned with the existence of justification, transparency and intelligibility within the decision-making process. But it will also be concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[26] In my view, given the facts in this case, the decision is not within the realm of reasonableness. It is not that the decision-maker, the Minister's delegate, did not follow the analysis grid to apply in cases in which an opinion that the refugee poses a danger must be issued. *Ragupathy v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151, [2007] 1 FCR 490 clearly establishes the analytical framework that was followed in this case:

> (ii) *elements of a "danger opinion" under paragraph 115(2)(a)*
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> [16] In order to determine the adequacy of the reasons given by the delegate in the present case, it is relevant to start by identifying the elements in a "danger opinion", and here I agree entirely with the analysis of the learned Applications Judge. First, paragraph 115(2)(*a*) expressly requires that the protected person is inadmissible on grounds of serious criminality. It is not disputed that the offences committed by Mr. Ragupathy render him inadmissible on this ground.
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> [17] Second, paragraph 115(2)(*a*) provides that, before being liable to deportation, a protected person must also be, in the opinion of the Minister, a danger to the public. This determination is to be made on the basis of the criminal history of the person concerned, and means a "present or future danger to the public": *Thompson v. Canada (Minister of Citizenship and Immigration)* (1996), 118 F.T.R. 269 at para. 20. At this stage of the inquiry, the delegate's task is to form an opinion on whether the person concerned is a danger to the public, rather than to determine the relative gravity of any danger that he may pose, in comparison to the risk of persecution: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 592 (C.A.) at para. 147.
>
> [18] If the delegate is of the opinion that the presence of the protected person does not present a danger to the public, that is the end of the subsection 115(2) inquiry. He or she does not fall within the exception to the prohibition in subsection 115(1) against the *refoulement* of protected persons and may not be deported. If, on the other hand, the delegate is of the opinion that the person is a danger to the public, the delegate must then assess whether, and to what extent, the person would be at risk of persecution, torture or other inhuman punishment or treatment if he was removed. At this stage, the delegate must determine how much of a danger the person's continuing presence presents, in order to balance the risk and, apparently, other humanitarian and compassionate

> circumstances, against the magnitude of the danger to the public if he remains.
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> [19] The risk inquiry and the subsequent balancing of danger and risk are not expressly directed by subsection 115(2), which speaks only of serious criminality and danger to the public. Rather, they have been grafted on to the danger to the public opinion, in order to enable a determination to be made as to whether a protected person's removal would so shock the conscience as to breach the person's rights under section 7 of the Charter not to be deprived of the right to life, liberty and security of the person other than in accordance with the principles of fundamental justice. See *Suresh v. Canada (Minister of Citizenship and Immigration),* especially at paras. 76-9 [of the Federal Court of Appeal].

It was rather at the initial stage, after having simply found that the offences constituted offences for which Mr. Makomena was inadmissible on grounds of serious criminality, that it should have been reasonably established that he posed a current or future danger to the public. In my view, the rehabilitation of the applicant based on the evidence adduced required an explanation that was never forthcoming as to why it should be disregarded. That was a key element.

V. Analysis

[27] The applicant raised three arguments. First, is was alleged that the criminological expertise report was basically ignored. Second, the crimes in question are not sufficiently serious offences to warrant a danger opinion according to the case law of the Federal Court of Appeal in *Nagalingam v Canada (Minister of Citizenship and Immigration),* 2008 FCA 153. Third, the analysis of the risks the applicant would face if he was returned to the Democratic Republic of the Congo was unreasonable.

[28] To my mind, it is the applicant's first two arguments that lead to the conclusion that the decision is unreasonable. The analysis must of course begin with defining the meaning of the expression "public danger". *Williams v Canada (Minister of Citizenship and Immigration)* (C.A.), [1997] 2 F.C. 646 [*Williams*] has established a precedent. The Federal Court of Appeal defined the expression in the following manner in the context in which the wording was subject to a constitutional challenge due to its vagueness:

> 29 … In the context the meaning of "public danger" is not a mystery: it must refer to the possibility that a person who has committed a serious crime in the past may seriously be thought to be a potential re-offender. It need not be proven "indeed it cannot be proven" that the person will reoffend. What I believe the subsection adequately focusses the Minister's mind on is consideration of whether, given what she knows about the individual and what that individual has had to say in his own behalf, she can form an opinion in good faith that he is a possible re-offender whose presence in Canada creates an unacceptable risk to the public. …
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> [Emphasis added.]

The emphasis placed on re-offending is clearly evident here. The Minister must be able to seriously find that the person is considered a potential risk. It is unclear what the decision-maker was referring to when he transformed the test into the existence of [TRANSLATION] "a sufficient amount of evidence to make the decision that he poses a potential risk" (Decision, p. 9 of 17). In any event, the decision should deal in large part with the potential to re-offend, and criminological expertise was at the core of the argument that the risk of re-offending was low. The decision-maker should have considered this significant evidence. As it was put in an earlier influential decision in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667, 157 FTR 35:

> [17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains* v. *Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.
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> [Emphasis added.]

The decision was endorsed by the Federal Court of Appeal (*Hinzman v Canada (Citizenship and Immigration)*, 2010 FCA 177, [2012] 1 FCR 257, at para 38) and by a number of other courts.

[29] This more than 20-year-old case law is perfectly consistent with the case law since *Dunsmuir*. As it has been noted, a decision is reasonable when it falls within a range of possible, acceptable outcomes, but it must also meet the requirement that the decision-making process was transparent and intelligible, and in which justification of the decision is found (*Canada (Attorney General) v Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 SCR 80, at para. 18). Thus, it is true that an administrative tribunal will not have to refer to every single piece of evidence. However, where there is evidence that tends to contradict the finding that the decision-maker has made, without the decision-maker's inconvenience being explained, such an omission could be fatal. The decision-making process can no longer be intelligible and transparent.

[30] I appreciate that perfection in the reasons provided is not expected (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland and Labrador Nurses' Union*] at para. 18). But the reasons remain important in the eyes of *Dunsmuir*. In *Newfoundland and Labrador Nurses' Union*, the Court carefully notes that "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met" (para 16). If an important piece of evidence has not been considered, we do not see how a reviewing court would be able to find the decision to be reasonable.

[31] Reviewing courts were invited to read the reasons in correlation with the outcome, even going so far as to examine the record. *Newfoundland and Labrador Nurses' Union* reads as follows:

> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[32] Reasons may be supplemented where they are insufficient or even lacking, in particular circumstances (*Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, [2018] 2 SCR 293, at paras. 51 to 56). But this does not authorize the Court to substitute its own reasons. Just recently, the Supreme Court underscored the point in *Delta Air Lines Inc. v Lukács*, 2018 SCC 2, [2018] 1 SCR 6 [*Lukács*]:

> [24] The requirement that respectful attention be paid to the reasons offered, or the reasons that could be offered, does not empower a reviewing court to ignore the reasons altogether and substitute its own: *Newfoundland Nurses*, at para. 12; *Pathmanathan v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 353, 17 Imm. L.R. (4th) 154, at para. 28. I agree with Justice Rothstein in *Alberta Teachers* when he cautioned:
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> > The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" . . . . [para. 54, quoting *Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56]
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> In other words, while a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided. Additional reasons must supplement and not supplant the analysis of the administrative body.

[33] In fact, in *Lukács*, the Court endorsed the decisions in *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431, at its paragraph 11, which had already been endorsed by the Federal Court of Appeal in *Lloyd v Canada (Attorney General)*, 2016 FCA 115, where it states at paragraph 24:

> [24] In light of the adjudicator's findings, even on a generous application of the principles in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the basis upon which the 40-day suspension was justified cannot be discerned without engaging in speculation and rationalization. As I noted in *Komolafe v. Canada (Citizenship and Immigration)*, 2013 FC 431, at para.:
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> > *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have

> been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[34] We are faced with the same difficulty here. We cannot ascertain what kind of treatment was given to the rehabilitation alleged and supported by the report of an expert. In fact, the report was essentially ignored, other than one paragraph that was quoted out of context.

[35] Upon reading the criminological assessment, one cannot but conclude that the term of imprisonment served for the last crime committed in 2013 left the applicant severely shaken. While the first two conditional sentences may have appeared fairly lenient, the same surely cannot be said of the period of incarceration of six months less a day. The report reads at page 7:

> [TRANSLATION]
>
> As for the offences, the subject differentiates his actions from those of his accomplices, but not in a way as to minimize them. He presented no justification or rationalization that would leave us with the impression that he had an anti-social attitude or pro-criminal values. Rather, he appears to ashamed of his conduct, which is unacceptable in the country that welcomed him. When it is a question of the consequences of his run-ins with the law on his family (his wife and daughter), or a question of the risk of being returned to the Congo, and the ensuing consequences for himself and his family of which he is aware, what we have before us is a shaken and vulnerable man, who is trying his level best to control

> his feeling of panic and who promises to never resume such activities.

[36] The criminologist explains that the outlook with respect to risk of re-offending over the short and medium term is good. A long-term attempt at predicting the potential risk would not have the same level of reliability because the factors taken into consideration can change. Thus, the risk of the applicant re-offending is low (zero risk does not exist, and low risk covers people who do not present a higher risk than that posed by the population as a whole) in the short and medium term. The criminologist states as follows on page 7:

> [TRANSLATION]
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> As for the risk of criminal re-offending, in the short and medium term, the attitudes, values, family support, the family's disapproval of the criminal behaviour to which he sensitive, the introspection and understanding of the consequences that come with committing further criminal acts, lead me to find that there is a low risk of re-offending in the short and medium term.

In the longer term, the outlook is between "low" and "moderate" as a result of certain risk factors that remain present (3 instances of re-offending over 13 years, lack of stable employment). One can read, at page 8:

> [TRANSLATION]
>
> In the longer term, given the presence of certain risk factors (previous instances of re-offending (3 offences of a similar nature (fraud) over 13 years), lack of employment, potential psychological and emotional impacts related to past experience), but also the lack of several risk factors that are generally closely and positively associated with a low risk of re-offending (advanced age when first offence was committed, no alcohol, drug or gambling problems, no significant debts, no anti-social attitudes, no variation in the type of offences or level of seriousness of those offences, the fact that he no longer is in contact with persons engaged in criminal activities, etc.) et de la presence of a number

> of protective factors (marital and residential stability (and quality), family support, values and importance given to his presence and positive contribution to his family, academic and employment history, introspection, his fear of being returned to the DRC), the longer-term risk of re-offending, at the moment of this assessment, is low to moderate. However, in Mr. Makomena's case, the only risk factor that remains static, which influences the risk of re-offending and which cannot changed, is his criminal history. As a result, our recommendation would be to act on dynamic risk factors, which remain present but which may no longer be present in a few months or years or have a greatly diminished impact, namely by providing psychological help as needed, as well as support for training and employment. This would, in our view, lead to a much lower risk than moderate in the longer term.
>
> As for his potential for positive social integration, for the above-mentioned reasons, we feel that it is good bon. In certain areas the prospects for employment are very promising and he has the potential to be an asset to the community. His criminal record would not be a barrier to employment in every sector.
> Mr. Makomena is an important person for Ms. Générose Makomena and for their daughters Believe. If he was to leave the country, it could be traumatic experience for the teenager.

[37] As indicated above, the Minister wonders whether Mr. Makomena can seriously be considered to be a potential re-offender. At the very least, the Minister's delegate had a duty to consider the evidence provided by the expert. Disregarding it is fatal because the reviewing Court cannot determine whether the decisions is reasonable. Rather, the decision exaggerated the fact that Mr. Makomena had been a participant in conspiracies, and the fact that there were accomplices (thus it became "a criminal Congolese organization").

[38] Stunningly, while the instances of fraud committed all involved a few thousand dollars ($47,000 in total), the decision-maker sees in the ultimate sentence of a term of imprisonment the suggestion that [TRANSLATION] "the subject's behaviour is becoming increasingly dangerous", rather than the end result of two convictions that resulted in conditional sentences. It was not

because he was more dangerous: it was because he had failed to understand the signal given. In addition, stunningly, the only direct reference to the criminological report was to support the decision-maker's assertion that his motivation for not committing further offences was his fear of removal from Canada. The decision-maker cites the criminologist:

> [TRANSLATION]
>
> *However, the subject was more shaken by the prison sentence in 2016: being separated from the family home, not being able to see his daughter, his wife having to travel each week to visit him etc. In addition, if the prison sentence was relatively short, the consequences such as the risk of removal from the country and the impact of his family [sic] are all the more significant [sic] for him.*
>
> [Italics in original. Decision, p. 11]

[39] One would rather think that the prison sentence would have served to yield the results that were expected and consistent with the objectives of a sentence: deterrence, assisting in rehabilitating offenders, promoting a sense of responsibility in offenders, while denouncing the unlawful conduct and the harm done (s. 718 of the *Criminal Code*).

[40] By disregarding the criminologist's report and using the sole passage cited from it to argue the opposite of what that passage stated, the decision-maker simply failed to consider evidence that went to the heart of the matter to be decided: is the applicant, in light not only of this particular evidence but the evidence as a whole, someone who can be <u>seriously</u> considered to be a potential re-offender? Given the crimes committed in the past, the last of which was in 2013, one must ask whether "[the Minister] can form an opinion in good faith that he is a possible re-offender whose presence in Canada creates an unacceptable risk to the public" (*Williams*, above, at para. 29).

[41] It suffices to dispose of this matter to conclude, as I have, that the decision rendered is not within the realm of reasonableness. The failure to consider evidence that went to the heart of the matter to be resolved prevents the Court from determining whether the decision is reasonable. I would add that the presence of the words “serious crimes”, “seriously”, “form an opinion in good faith”, “unacceptable risk” in the formulation of what constitutes a danger to the public in *Williams* suggests that not every offence punishable by ten years of imprisonment means that an opinion under section 115 of the Act would be appropriate. Moreover, were this to be the case, it would not be consistent with the wording of section 115 of the Act, which requires that grounds of serious criminality be established first before determining that the person is a danger to the public. The two are not to be confused.

[42] In *Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 153, [2009] 2 FCR 52 [*Nagalingam*], the Federal Court of Appeal confirmed that “paragraph 115(2)(b) will only be triggered where the acts committed are of substantial gravity” (para. 73). The person designated to provide a new opinion pursuant to section 115 of the Act ought to have reconsidered the nature and seriousness of the acts committed: inadmissibility on grounds of serious criminality does not relieve the decision-maker from having to examine the nature and seriousness of the acts (*Nagalingam*, para. 44). In fact, the multiplication of offences punishable by at least ten years’ imprisonment in federal legislation fully warrants prudence as to which offences could exclude a person from protection against refoulement.

VI. Conclusion

[43] The application for judicial review must be allowed. The parties have agreed that this matter is *sui generis* and that there is no question to certify. The Court agrees.

JUDGMENT in Docket IMM-5856-18

THE COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed;

2. The matter should be reviewed by a person delegated by the Minister other than the decision-maker in this case;

3. No question is certified under section 74 of the Act.

"Yvan Roy"
Judge

Certified true translation
On this 30th day of July 2019

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5856-18
STYLE OF CAUSE:	GERRY MAKOMENA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MAY 27, 2019
JUDGMENT AND REASONS:	ROY J.
DATED:	JULY 5, 2019

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