Federal Court Cour fédérale

Date: 20210804

Docket: IMM-1536-20

Citation: 2021 FC 820

Ottawa, Ontario, August 4, 2021

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

JAVID HOSEIN SOLTANI

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of the Minister's Delegate, dated January 30, 2020, which determined that the Applicant constituted a danger to the public in Canada, would not face persecution or personalized risk if returned to Afghanistan, and that humanitarian and compassionate [H&C] factors did not outweigh the danger he poses to the public.

II. Background

[2] The Applicant, Javid Hosein Soltani, was born in Afghanistan on January 16, 1988. His ethnicity is Hazara.

[3] Before the Applicant's first birthday, his father was imprisoned by the Taliban regime. In 1998, his family fled to Iran to avoid persecution by the Taliban. Next, the Applicant's family applied for refugee protection from outside Canada via the United Nations High Commissioner for Refugees [the "UNHCR"]. In November of 2003, when the Applicant was 15 years old, he, his mother and his four siblings entered Canada as Convention refugees and permanent residents. The family settled in Kitchener, Ontario and his father joined them sometime in 2007.

[4] In 2004, at the age of 16, the Applicant was convicted of assault causing bodily harm and sentenced to 18 months probation under the *Youth Criminal Justice Act*, SC 2002, c 1.

[5] The Applicant's first criminal conviction as an adult occurred in May of 2007. He received 18 months probation for assault per section 266 of the *Criminal Code*, RSC 1985, c C-46. That year, he was also convicted of uttering threats. In August of 2008, he was convicted of possession of a dangerous weapon and uttering threats. To date, he has amassed nearly thirty convictions.

[6] In September of 2008, the Applicant was the subject of a report pursuant to section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "*IRPA*"] following a conviction

of possession of a weapon for a dangerous purpose. He received a warning letter from the Canada Border Services Agency [the "CBSA"].

[7] Following a conviction for robbery, the Applicant was reported pursuant to section 36(1) of the *IRPA* and referred to the Immigration Division of the Immigration and Refugee Board of Canada [the "IRB"]. On March 28, 2019, the Immigration Division determined that the Applicant was inadmissible to Canada due to serious criminality and issued a deportation order against him.

[8] On April 25, 2019, the Applicant was notified of CBSA's intention to seek a Ministerial Opinion that the Applicant constituted a danger to the public in Canada, per subsection 115(2)(a) of the *IRPA* [the "danger opinion"]. In October of 2019, the Applicant's counsel provided submissions on his behalf.

[9] On January 30, 2020, the danger opinion was delivered. The Applicant became aware of this decision in late February via email. In early March, the Applicant initiated judicial review proceedings.

III. Decision under Review

[10] In the danger opinion, the Minister's Delegate described the Applicant as a habitual offender who has systemically resorted to violence and threatened to harm or kill his victims. The Minister's Delegate found that there was insufficient evidence to demonstrate that the Applicant was taking meaningful steps to address his mental health issues, manage recidivism

and lead a prosocial lifestyle upon release. On balance, the Minister's Delegate was satisfied that the Applicant presents a danger to the public, whose presence in Canada poses an unacceptable risk.

[11] The Minister's Delegate then went on to assess the possible risks to life, liberty and security of the person should the Applicant be removed to Afghanistan, pursuant to subsection 115(1) of the *IRPA* and section 7 of the *Canadian Charter of Rights and Freedoms,* Part 1 of *The Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [the "*Charter*"]. Based on the evidence before them, the Minister's Delegate was of the opinion that, on balance, the Applicant would not personally face a risk of persecution, risk to life, or risk of torture or cruel and unusual treatment if removed to Afghanistan.

[12] With respect to H&C considerations, the Minister's Delegate found that although the Applicant has lived in Canada since the age of 15, his ties here are rather weak. He is single, childless, unemployed and has no assets. The Minister's Delegate also found that there was insufficient medical evidence to substantiate the claims that the Applicant has schizophrenia and a kidney condition. Ultimately, the Minister's Delegate was of the opinion that the H&C factors do not outweigh the danger that the Applicant poses to the public.

IV. Issues

[13] The issues in this application are:

1) Did the Minister's Delegate overlook or disregard critical evidence pertaining to risk?

2) Did the Minister fail to conduct a meaningful and reasonable risk analysis required under subsection 115(2) of the *IRPA?*

3) Is the Minister's Delegate's decision with respect to the H&C considerations reasonable?

V. Standard of Review

[14] The parties agree that the applicable standard of review in this case is that of reasonableness. The Court must show deference to the decision-maker and determine whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 16).

VI. Relevant Provisions

[15] The relevant provisions include section 115 of the *IRPA*:

Protection	**Principe**
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.
Exceptions	**Exclusion**
(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.

VII. Analysis

[16] This Court has repeatedly stated that the principles that govern the analysis under subsection 115(2)(a) of the IRPA are as follows:

a) A protected person or a Convention refugee benefits from the principle of non-refoulement recognized by subsection 115(1) of the *IRPA*, unless subsection 115(2)(a) applies.

b) For subsection 115(2)(a) to apply, the individual must be inadmissible on the ground of serious criminality.

c) If the individual is inadmissible, the Minister must determine whether the person should not be allowed to remain in Canada because they are a danger to the public.

d) Once such a determination is made, the Minister must conduct a section 7 *Charter* analysis. The ultimate question is this: if the individual is sent back to their country of origin, will they personally face a risk to life, liberty or security on a balance of probabilities? A Convention refugee cannot rely on their status to trigger a section 7 *Charter* analysis.

e) The Minister must balance the danger to the public in Canada against the degree of risk, as well as any other humanitarian and compassionate considerations.

(*Suresh v Canada (Minister of Citizenship and Immigration),* 2002 SCC 1 at paras 76-79, 127)

[17] While subsection 115(2) does not *expressly* direct decision-makers to conduct a risk inquiry or a balancing of danger and risk, this Court has repeatedly held that the purpose of the provision is to determine whether the danger that an applicant poses to the Canadian public outweighs the risk to life, liberty and security of person and “other humanitarian and compassionate considerations” facing the applicant upon return to their country of origin. To remain in Canada, the risks and hardship must outweigh the danger to Canadians.

[18] As such, the Supreme Court of Canada “grafted on” a balancing exercise to enable decision-makers to determine whether a person who poses a danger to the public in Canada ought to remain protected under subsection 115(1) or be exempted from such protection under subsection 115(2) (*Makomena v Minister of Citizenship and Immigration,* 2019 FCJ No 782 at para 26).

[19] In this case, there is no dispute that the offences committed by the Applicant render him inadmissible on grounds of serious criminality and therefore, a danger to the public under subsection 115(2)(a). At issue in this judicial review is the Minister’s Delegate’s weighing of this danger against the risks and hardships faced by the Applicant upon his return to Afghanistan.

[20] It is the Applicant’s position that the Minister’s Delegate’s decision was unreasonable. He submits that the decision does not mention critical evidence that squarely contradicts the Minister’s Delegate’s conclusion. Specifically, the Applicant presented evidence pertaining to the risks he would face in Afghanistan as a Hazara and as a long-term foreign returnee from a Western country. Despite this “overwhelming evidence”, the Minister’s Delegate concluded that there was insufficient information to demonstrate that the Applicant would be at risk. The Applicant submits that the Minister’s Delegate failed to conduct a meaningful analysis of the evidence before them and therefore, the decision is unreasonable and should be set aside.

[21] It is the Respondent’s position that the Applicant has not raised a fairly arguable case that the Minister’s Delegate’s decision was unreasonable. The Minister’s Delegate has broad statutory discretion to form an opinion that a protected person or Convention refugee who is inadmissible due to serious criminality constitutes a danger to the public. The Applicant has amassed nearly thirty criminal convictions, many violent, including random and non-random acts of violence, and it was reasonable for the Minister’s Delegate to find that this criminal history outweighed the risks of removal to Afghanistan and H&C factors.

[22] The Applicant provided multiple sources of objective evidence about the risks he would face if returned to Afghanistan including the social discrimination, harassment, kidnappings and killings faced by both Afghan Hazaras and “Westernized” returnees. While the danger opinion quotes from this evidence, the Applicant submits that the Minister’s Delegate simply disregarded all of it when they concluded that there was insufficient information demonstrating that the Applicant would be at risk.

[23] This Court has held that failure to consider specific evidence may be sufficient to set aside a decision, but only when the non-mentioned evidence is critical and contradicts the decision-maker's conclusion, and where the Court determines that its omission means that the decision-maker disregarded the material before it (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) at para 17, endorsed in *Hinzman v. Canada*, 2010 FCA 177).

[24] The Respondent argues that the danger opinion is very detailed and sets out the reasons for the decision in clear and unambiguous language. A reviewing Court cannot expect decision-makers to respond to *every* argument or to make an explicit finding on *every* constituent element leading to its final decision.

[25] The Minister's Delegate considered, engaged with and weighed the evidence before them when conducting the risk assessment. Contrary to the Applicant's submissions, there was not simply a "selective analysis". The fact that the danger opinion quotes directly from the objective evidence indicates that the evidence was in fact considered. The Minister's Delegate acknowledged the evidence that returnees and Hazaras had been tortured and killed in Afghanistan, but also cited evidence that the situation for Afghan Hazaras has improved and that there are now measures in place to support sustainable reintegration of returnees in Afghanistan. The danger opinion does not contain any fundamental gap or unreasonable chain of analysis with respect to the risk assessment. As such, this Court should not substitute its own justification for the danger opinion. That being said, the Court acknowledges that the danger opinion cites objective evidence that Kabul's rapid population growth has further exacerbated inadequate

access to mental health services, and that the Minister's Delegate explicitly acknowledges the Applicant's mental health issues, including childhood trauma and schizophrenia.

[26] The Applicant takes the position that the Minister's Delegate failed to apply the correct risk analysis under section 7 of the *Charter*. He submits that the Minister's Delegate considered that range of risks to life, liberty and security of the person under sections 96 and 97 of the *IRPA* rather than the different and broader test required under section 115 of the *IRPA*.

[27] The Respondent submits that the Minister's Delegate considered both the Applicant's submissions and general country condition documentation. The Respondent analogizes with *Baladie v Minister of Citizenship and Immigration*, 2018 FC 706 at paragraphs 40-43, where the Court explained that the Minister's Delegate's focus on an assessment of section 96 and 97 risks was easily explainable by the fact that the applicant had not provided evidence of any risks other than those envisioned in those two provisions.

[28] In the subsection 115(2) risk analysis, there is no requirement that the applicant demonstrate that they will be at greater risk than the general population, however, "an applicant must still show that he or she would personally be at risk for his or her life, liberty or security if removed to his or her country of origin" (*Galvez Padilla v Canada (Minister of Citizenship and Immigration)*, 2013 FC 247 at para 69).

[29] The Minister's Delegate properly conducted the section 7 risk analysis required in connection with subsection 115(2)(a) of the *IRPA*. The Applicant did not proffer evidence of any

risks to section 7 rights that are not included in sections 96 and 97 of the *IRPA,* such as the right to privacy, right to parental interest in caring for one's child, choosing where to establish a home, etc. Additionally, the Minister's Delegate clearly states in the final paragraph of their risk assessment that they have considered the country condition documents and the Applicant's submissions, and the possible risks to life, liberty and security of the person as set out in section 115 of the *IRPA* and section 7 of the *Charter.* The Minister's Delegate understood and applied the proper risk assessment pursuant to subsection 115(2) of the *IRPA*.

A. *Humanitarian and Compassionate Factors*

[30] With respect to H&C factors, the Minister's Delegate acknowledged that the Applicant has not been in Afghanistan since he was 15 years old, has a grade 11 education and suffers from schizophrenia. They also acknowledged that the Applicant would have a lower quality of life in Afghanistan, that reintegrating would be challenging and that his removal would be hard on his family, especially his mother. However, the Minister's Delegate also noted that Kabul boasts many of Afghanistan's services, the Applicant is able-bodied, and his relationships with his family have deteriorated.

[31] The Minister's Delegate was then required to conduct a balancing exercise and determine whether the H&C factors outweigh the danger that the Applicant poses to the public. The Applicant appears to suggest that the Minister's Delegate failed to perform this balancing exercise, because they did not explain how they arrived at their conclusion.

[32] I find that the Minister’s Delegate conducted a thorough review of the Applicant’s circumstances, conducted the balancing exercise, and reasonably found that the H&C factors did not outweigh the danger that the Applicant presents to the Canadian public.

[33] The Minister’s Delegate was entitled to make a decision based on a weighing of the evidence before them. The Minister’s Delegate acknowledged that Afghanistan was a poor and unstable country that has suffered security challenges for decades. However, the Applicant did not provide any evidence as to how these general risks were personally tied to his life, liberty or security of the person. The Minister’s Delegate was alive to the fact that the Applicant’s quality of life in Afghanistan would not be comparable to that of Canada. The fact that the conditions in Afghanistan are less desirable than those in Canada is not enough to outweigh the danger the Applicant poses to the Canadian public as a habitual and violent offender. The Applicant invites the Court to reweigh the evidence, which is not the role of the Court.

[34] The Applicant has had an unfortunate life in Canada, given that for most of his adult life, the Applicant has been homeless or in rooming houses, unemployed, and coping with serious mental health issues with limited support. While applicants should never be chastised or punished for their childhood trauma and/or mental illnesses, nevertheless, in the particular circumstances of this case I find that the decision of the Minister’s Delegate is reasonable.

[35] For the reasons above, this application is dismissed.

JUDGMENT in IMM-1536-20

THIS COURT'S JUDGMENT is that:

1. This application is dismissed.

2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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