Federal Court  Cour fédérale

Date: 20230502

Docket: IMM-5145-22

Citation: 2023 FC 634

Ottawa, Ontario, May 2, 2023

PRESENT: Associate Chief Justice Gagné

BETWEEN:

AMEERULLAH MAJEEDULLAH SHAIKH

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Shaikh, is a foreign national. In October 2021, he was convicted in the Provincial Court of British Columbia of the offence provided for in section 320.16(1) of the *Criminal code* (Failure to stop after accident). This offense is punishable by way of indictment and liable to imprisonment for a term of not more than 10 years. As a result, a Canada Border Services Agency Officer prepared a report pursuant to subsection 44(1) of the *Immigration and*

Refugee Protection Act, [IRPA], alleging that the Applicant is inadmissible on grounds of serious criminality.

[2] Two months after the report was prepared, a Minister's Delegate interviewed the Applicant in order to determine if the subsection 44(1) report was well-founded. The Applicant and his counsel requested an adjournment of the interview, which was denied. Upon completing the interview, the Minister's Delegate advised the Applicant that he considered the report to be well-founded, and issued a removal order pursuant to subsection 44(2) of the IRPA.

[3] The Applicant now claims that the Officer breached his duty of procedural fairness by finding the report well-founded without adjourning the interview and giving him a meaningful opportunity to make submissions.

II. Facts

[4] The parties have conflicting accounts of how the Minister's Delegate's interview with the Applicant was scheduled, including whether or not the Applicant failed to appear for an interview initially scheduled for May 10, 2022. The difference is material since the reasons the Minister's Delegate gave for denying the Applicant's requests for an adjournment of the May 11 interview suggest the Applicant's failure to appear for the first interview played a role in the denial.

[5] The Minister's Delegate's notes and his solemn declaration indicate that the Applicant did not show up for an interview scheduled for May 10, 2022, and that it was the CBSA that subsequently contacted him to re-schedule it:

> Mr. Shaikh failed to appear for the interview scheduled yesterday, May 10, 2022, and failed to notify CBSA that he would not be attending. As a result, Mr. Shaikh was contacted yesterday and today's interview was arranged.

[6] By contrast, in his affidavit sworn on June 27, 2022, the Applicant avers that it was he who called CBSA and re-scheduled his interview pre-emptively (no mention is made of a missed interview):

> I called the number provided on the letter and was able to move my interview to May 11, 2022.
>
> [Emphasis added.]

[7] However, according to the Minister's Delegate's notes, the Applicant gave a response in an interview which would appear to contradict the Applicant's affidavit:

> "May I clarify one thing, when you call me yesterday, about whether I receive the document in the mail"
>
> [Emphasis added.]

[8] Taken together, the above suggests it is more likely than not that the Applicant missed his scheduled interview on May 10, 2022 and that it was only re-scheduled after the CBSA followed-up with him.

[9] Turning to the circumstances of the re-scheduled interview on May 11, 2022, the Applicant's affidavit describes the somewhat involved process that led to him retaining a lawyer for it. The Applicant first called his immigration consultant, then one lawyer who told him he did not take immigration cases, then another who was unavailable but who referred him to a third lawyer, who himself referred him to a fourth, the Applicant's current counsel. It is unclear over what period this took place, though the Applicant's counsel was retained just hours before the Applicant's rescheduled interview.

[10] The interview with the Applicant was held in the early afternoon of May 11, 2022. Both the Applicant's current counsel as well as the third-contacted lawyer attended the Applicant's interview, though only the Applicant's current counsel is described as having been retained by the Applicant.

[11] Applicant's counsel made at least three requests for the interview to be adjourned: first by voicemail prior to the interview, then in-person immediately prior to the interview, and finally by way of "application" during the interview. The reason counsel gave for the request was that he had only been retained 1-2 hours before the interview and that he had not had the chance to obtain proper instructions, nor to interview or speak with the Applicant's criminal defence lawyer. The Minister's Delegate denied each request for adjournment.

[12] When asked by the Minister's Delegate if he had any statements or evidence to present, the Applicant asked to speak with his counsel. The Minister's Delegate denied this request also, stating "You already had an opportunity to speak to your lawyer before the interview today."

[13] After a short break in the interview, the Minister's Delegate rendered his decision.

III. Decision Under Review

[14] The decision targeted by this application for judicial review is the Minister's Delegate's May 11, 2022 finding that the subsection 44(1) report was well-founded. The decision resulted in a deportation order being issued, and is captured in the Minister Delegate's solemn declaration documenting the interview.

[15] The Minister's Delegate refused Counsel's request to adjourn the interview, for the following reason:

> Before going any farther I would like to address Counsel's request to adjourn the interview today. I have decided to refuse the request for an adjournment. The interview will proceed as scheduled. Mr. SHAIKH has had two weeks to prepare for the interview today and has decided to retain Counsel at the last moment. The letter advising of his interview was mailed to Mr. SHAIKH on April 26, 2022 and delivered on April 28, 2022. Mr. SHAIKH failed to appear for the interview scheduled yesterday, May 10, 2022, and failed to notify CBSA that he would not be attending. As a result Mr. SHAIKH was contacted yesterday and today's interview was arranged. My role today is limited to determining if the inadmissibility report is valid. I note that Mr. SHAIKH will retain the right to appeal any decision made today to the Federal Court.

[16] The Applicant later gave a response detailing the steps he took to retain a lawyer, concluding by stating that the result was that "he did not have a lot of opportunity" to discuss his case with either of his counsel. The Applicant asked if he could have more time to discuss the case with them, but the Applicant's request was refused.

[17] After a short pause in the interview the Minister's Delegate provided his decision and reasons for decision:

> I am satisfied that you are inadmissible to Canada pursuant to paragraph 36(1)(a) of the Act and I will find this report valid. Therefore, I am making a Deportation Order.
>
> I am satisfied that you are not a Canadian citizen or a permanent resident of Canada. I am satisfied that you were convicted of the offence of 'Failure to stop after accident' contrary to section 320.16(1) of the Criminal Code of Canada. This offence is punishable by a term of not more than ten years […].

[18] After the decision was rendered, the Applicant was asked if he had any questions concerning the interview. The Applicant responded "No I would just like to give a little bit of information about my background." He was interrupted by his counsel, who advised him not to say anything.

IV. Issues and Standard of Review

[19] The sole issue is whether the duty of procedural fairness owed to the Applicant was breached.

[20] Procedural fairness questions are considered on a standard akin to correctness, with the reviewing court having to determine whether the procedure was fair, having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-56).

V. Analysis

[21] The Applicant argues that a breach of the duty of procedural fairness occurred when the Minister's Delegate refused to grant the Applicant's request to adjourn the interview.

[22] The Applicant contrasts their own case with that of *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319. In *Sharma*, the applicant — a permanent resident — was invited to make written submissions on a variety of considerations, and also submitted letters of support. By contrast, the Applicant argues that he was provided with no opportunity to make submissions with respect to the officer's issuance of the subsection 44(1) report, nor to the Minister's Delegate's decision that the report was well-founded, and that his request for an adjournment was denied.

[23] The Applicant argues that had the Minister's Delegate granted an adjournment of the interview, his counsel would have been able to prepare submissions in line with certain factors listed in Immigration Manual ENF 6 and noted in *Sharma*, which include length of residence, degree of establishment, and seriousness of the offence [*Sharma*, para 46].

[24] The Respondent makes two preliminary arguments. First, they argue that the Applicant's affidavit contains information that should not be considered, as it was not before the decision-maker. Second, they submit that the Applicant's application for judicial review is focused on the Minister's Delegate's May 11 decision; hence the Respondent argues the Applicant's arguments

pertaining to alleged breaches of procedural fairness during the preparation of the subsection 44(1) Report are irrelevant.

[25] The Respondent makes three main points concerning the Applicant's arguments regarding the preparation of the subsection 44(1) Report. First, he submits that the *Sharma* decision concerns an applicant's ability to make submissions before a subsection 44(1) Report is finalized, and hence does not apply in this case as the judicial review targets the subsection 44(2) decision to issue a deportation order. Second, he argues that the Applicant waived his right to raise the issue of subsection 44(1) submissions by failing to have mentioned it at the Minister's Delegate's interview, where he was represented by two lawyers. Third, the Respondent draws from the case of *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 to submit that an officer's responsibility is limited to simple fact-finding and that considering the particular circumstances of the person is beyond their reach.

[26] Regarding the Applicant's argument that the Minister's Delegate ought to have adjourned the interview, the Respondent argues that the Applicant's rights were respected. They note that foreign nationals have lesser procedural fairness rights than permanent residents and citizens, and that the non-detained Applicant had no absolute right to have legal counsel present, much less to adjourn to allow counsel to prepare. Additionally, they submit that the Applicant's brief consultation with counsel prior to the interview was sufficient, as the facts of the case are simple and uncontested; in that sense, there was nothing counsel could have raised to change the facts.

[27] Finally, the Respondent notes, citing *Cha*, that sending the decision for redetermination would be futile, since the facts of this case would simply result in the issuance of a new deportation order.

[28] I largely agree with the Respondent's submissions. The Court's jurisprudence holds that both Officers and Minister's Delegates have very limited to no discretion in the context of their duties under section 44.

[29] Where, based on his or her fact-finding, an Officer finds that a foreign national or permanent resident is inadmissible for serious criminality, they are expected to prepare a report (*Cha*, at para 35, cited in *Virani v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1083).

[30] Similarly, the role of the Minister's Delegate has been held to be limited to making a deportation order if he or she is of the opinion that the report is well-founded, that no rehabilitation as defined in the *Immigration and Refugee Protection Regulations* [IRPR] has taken place (s.18 IRPR), and that the foreign national is an adult and able to appreciate the nature of the proceedings (ss. 228(4) IRPR); *Cha* at para 34).

[31] Furthermore, *Sharma* and other cases relied upon by the Applicant are distinguishable for having concerned permanent residents, not foreign nationals. The difference is significant because of the distinction contained within subsection 44(2); in the case of permanent residents, a Minister's Delegate decides whether to refer the inadmissibility report to the Immigration

Division. In the case of foreign nationals, the Minister's Delegate decides whether to, themselves, make a removal order.

[32] The factors that the Applicant argues they could have made submissions on if the interview was adjourned are specifically identified in both Immigration Manual ENF 6 and in *Sharma* as pertaining to cases where jurisdiction to issue a removal order rests with the Immigration Division, not the Minister's Delegate. As stated in *Sharma* at paragraph 46 "Manual ENF 6 lists the following factors that may be considered when deciding whether to refer a report to the ID" [Emphasis mine.] Other factors the Applicant argued should have been considered in Manuals ENF 5 and 6 are similarly identified as pertaining to permanent residents, not foreign nationals.

[33] I agree with the Respondent that as it concerns foreign nationals, the extent of the discretion that is granted to Minister's Delegates, or the lack thereof, is settled by *Cha*. There, Justice Robert Décary highlighted the different treatments IRPA reserves for foreign nationals as opposed to permanent residents and specifically stated that his reasons only applied to the former (*Cha,* at para 13). It is in that context that the Court was seized with the following certified questions, particularly relevant to the issue currently before this Court:

1. What is the scope of the Minister's Delegate's discretion under ss. 44(2) of the IRPA when making a removal order?

2. What is the extent of participatory rights required when a Minister's Delegate is making a decision pursuant to ss. 44(2) of the IRPA when making a removal order?

[34] In *Cha*, the Court generally observes that foreign nationals, who are temporary residents, receive comparatively little substantive and procedural protection throughout the IRPA, and that Parliament has made it clear that criminality of non-citizens is a major concern (*Cha*, at paras 23 – 24).

[35] First, with respect to the Officer's discretion to not issue a subsection 44(1) Report, in so far as foreign nationals convicted of certain offences in Canada are concerned, the Court notes it is limited to cases where:

> 1. A pardon has been granted; or
> 2. The convictions have been reversed; or
> 3. The inadmissibility resulted from the conviction of two offences that may only be prosecuted summarily and the foreign national has not been convicted in the five years following the completion of the imposed sentences; or
> 4. The offence is designated as a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*.
>
> (*Cha,* at para 33)

[36] Second, the Court in *Cha* answers the first certified question as follows:

> [34] When a report prepared by an immigration officer against a foreign national does not include any grounds of inadmissibility other than serious or simple criminality in Canada, the Minister's delegate is expected under subsection 228(1) of the *Regulations* to make a deportation order if he is of the opinion that the report is well-founded (i.e. that the immigration officer correctly found that all the requirements described above have been met) and if he is further satisfied that no rehabilitation within the meaning of section 18.1 of the *Regulations* has taken place and that the foreign national meets the age and mental condition requirements set out in paragraph 228(4) of the *Regulations*.

> [35] I conclude that the wording of sections 36 and 44 of the *Act* and of the applicable sections of the *Regulations* does not allow immigration officers and Minister's delegates, in making findings of inadmissibility under subsections 44(1) and (2) of the Act in respect of persons convicted of serious or simple offences in Canada, any room to manoeuvre apart from that expressly carved out in the *Act* and the *Regulations*. Immigration officers and Minister's delegates are simply on a fact-finding mission, no more, no less. Particular circumstances of the person, the offence, the conviction and the sentence are beyond their reach. It is their respective responsibility, when they find a person to be inadmissible on grounds of serious or simple criminality, to prepare a report and to act on it.

[37] With respect to the second certified question before the Court, Justice Décary considers the five specific factors enunciated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, and concludes as follows:

> [52] … The review of the five Baker factors lead, quite to the contrary, to the conclusion that a relatively low degree of participatory rights is warranted. I am satisfied that the following participatory rights meet the requirements of the duty of fairness:
>
> - provide a copy of the immigration officer's report to the person;
>
> - inform the person of the allegation(s) made in the immigration officer's report, of the case to be met and of the nature and possible consequences of the decision to be made;
>
> - conduct an interview in the presence of the person, be it live, by videoconference or by telephone;
>
> - give the person an opportunity to present evidence relevant to the case and to express his point of view.

[38] Here, the Applicant received proper notice of the interview, attended the interview with counsel, was provided with a copy of the report, and was given an opportunity to present evidence and make submissions.

[39] Of course, any evidence and submissions presented should be relevant to the scope of the discretion to be exercised by the Minister's Delegate. They should not purport to focus on the gravity of the offence, and the particular circumstances of the Applicant and his conviction in determining not to issue the removal order (*Cha* at para 39).

[40] The Applicant does not point to any evidence or submissions that could have been made that would have had any impact on the manner in which the Minister's Delegate exercised his very limited discretion and this argument should be dismissed.

VI. Conclusion

[41] For the above reasons, this application is dismissed. Although the Minister's Delegate's refusals to adjourn might have impacted the Applicant's procedural rights, I am of the view that the minimal level of procedural fairness required under the circumstances was not breached. Additionally, it appears that part of the reason the adjournment was denied was through the Applicant's own fault of a) not re-scheduling the initial interview and b) not retaining counsel sooner upon receiving notice of the interview. Furthermore, as the Applicant has not indicated what evidence or submissions he could have put forward that could have properly affected the Minister's Delegate's very limited discretion, it is very likely that a new hearing would simply produce the same result, and so would be futile.

[42] The parties have not proposed any question of general importance for certification and no such question arises from the fact of this case.

JUDGMENT in IMM-5145-22

THIS COURT'S JUDGMENT is that:

1. This Application for judicial review is dismissed.

2. No question of general importance is certified.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

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