Date: 20070803

Docket: IMM-6127-06

Citation: 2007 FC 815

Ottawa, Ontario, August 3, 2007

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

IBRAHIM YOUSIF ABDULAZIZ AL-KAFAGE

Applicant

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the "Reconsideration of Minister's Opinion" pursuant to paragraph 115(2)(a of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), that the applicant, a Convention refugee, should not be allowed to remain in Canada because:

1. he is inadmissible on grounds of serious criminality;
2. he constitutes a danger to the public in Canada; and
3. there was not a serious possibility that his removal would subject him to a risk of life, torture, cruel or unusual punishment or persecution.

BACKGROUND

[2] The applicant is a 48 year-old citizen of Egypt. He came to Canada on October 19, 1994 with his wife and daughter and applied for refugee status, which was granted on September 22, 1995. The applicant alleged that he had been persecuted by Egyptian authorities for his involvement with the Muslim Brotherhood, a political organization which had been banned in Egypt since 1954.

[3] On August 21, 1996, the applicant was convicted of four counts of sexual assault, uttering threats, and extortion. Most of the applicant's sexual assault victims were young women of Egyptian descent—the youngest victim was 13 years old. Each victim had come to trust the applicant, who posed as a "psychic healer" and, while purporting to lift curses that had been placed on the young women, sexually assaulted them. He was sentenced on October 15, 1996 to a total of ten years imprisonment.

[4] On May 2, 1997, the applicant's application for permanent residence was refused because of his criminal convictions. On October 28, 1997, the Minister issued a danger opinion declaring the applicant to be a danger to the public under paragraph 115(2)(a) of the Act. He was ordered deported on March 23, 1998 on grounds of serious criminality. On July 21, 2003, he was directed to report for removal on August 5, 2003. Following an application for leave to apply for judicial review of the direction to report, the Minister agreed to defer the applicant's removal pending a reconsideration of the 1997 danger opinion, and the applicant withdrew his leave application.

[5] On May 14, 2003, the National Parole Board imposed special conditions on the applicant's statutory release and released the applicant. In particular, the applicant was directed to report all relationships with females to his parole supervisor and to have no association with minors unless accompanied by an adult and pre-authorized to do so by his parole supervisor. The applicant was released from a Canada Border Services Agency (CBSA) hold on November 12, 2003.

[6] On July 28, 2005, Correctional Services Canada issued and executed a warrant of suspension and apprehension against the applicant based on reliable information that he had violated the terms of his release. The applicant was actively seeking out relationships with vulnerable women with young daughters. He was subsequently incarcerated. On November 22, 2005, the National Parole Board revoked the applicant's statutory release and the applicant remained in jail until he was taken into CBSA custody on May 19, 2006.

[7] On September 25, 2006, the Minister's delegate issued the re-consideration decision presently under review, which confirmed that the applicant continues to be a present and future danger to the public within the meaning of paragraph 115(2)(a) of the Act.

[8] The applicant was scheduled to be removed from Canada on November 20, 2006. By order issued that day, Mr. Justice Russell granted the applicant's motion for a stay of removal pending the outcome of this application for judicial review.

ISSUE

[9] The only issue in this application is whether the Minister's delegate erred in concluding that the applicant should be removed from Canada under paragraph 115(2)(a) of the Act.

RELEVANT LEGISLATION

[10] The legislation relevant to this application is the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act.). The key provisions of this legislation are subsection 36(1) and section 115 of the Act, which provide as follows:

Serious criminality

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(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;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years. […]

Grande criminalité

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

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;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans. […]

Principe

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

Protection

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.

Exceptions

(2) Subsection (1) does not apply in the case of a person

(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 […]

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.

Exclusion

(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :

a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada; […]

STANDARD OF REVIEW

[11] The jurisprudence establishes that a danger opinion issued under section 115 of the Act is a discretionary decision which attracts significant deference from the reviewing Court and which is only set aside if found to be patently unreasonable. As stated by the Supreme Court of Canada in *Ahani v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 7 at paragraphs 16 and 17:

> [..] A reviewing court should not reweigh the factors or interfere merely because it would have come to a different conclusion. Applying the functional and pragmatic approach mandated by *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, we conclude that the Parliament intended to grant the Minister a broad discretion in

> issuing a s. 53(1)(b) opinion, reviewable only where the Minister makes a patently unreasonable decision.
>
> […W]e conclude that the court may intervene only if the Minister's decision is not supported on the evidence, or fails to consider the appropriate factors. The reviewing court should also recognize that the nature of the inquiry may limit the evidence required. While the issue of deportation to risk of torture engages s. 7 of the Charter and hence possesses a constitutional dimension, the Minister's decision is largely fact-based. The inquiry into whether Ahani faces a substantial risk of torture involves consideration of the human rights record of the home state, the personal risk faced by the claimant, any assurances that the claimant will not be tortured and their worth and, in that respect, the ability of the home state to control its own security forces, and more. Such issues are largely outside the realm of expertise of reviewing courts and possess a negligible legal dimension. Considerable deference is therefore required.
>
> [Emphasis added]

[12] The standard of patent unreasonableness has subsequently been applied by this Court to decisions under the current Act: see, e.g., *Nagalingam v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 229 at para. 18; *Mircha v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 46 at para. 11; *Thuraisingam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 607 at paras. 26-28; *Thanabalasingham v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 172 at paras. 59-60; *Dadar v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1381 at para. 13; *Fabian v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1527 at para. 20.

ANALYSIS

[13] The applicant argues that the Minister's delegate erred in finding that the applicant lacked credibility and faced little danger if returned to Egypt. This conclusion, the applicant argues, amounts to an excess of jurisdiction insofar as it effectively overrules the 1995 decision of the Immigration and Refugee Board (the Board), which found that the applicant is a Convention refugee. The applicant also argues that the Minister's delegate erred in failing to inquire whether the death sentence previously imposed on the applicant by an Egyptian Court is still in effect.

[14] The applicant did not challenge the Minister's delegate's conclusion that the applicant constitutes a danger to the public in Canada. Accordingly, it is not necessary for me to address that aspect of the danger opinion.

[15] With respect to the applicant's argument that the Minister's delegate exceeded her jurisdiction by concluding that the applicant would not face a serious risk of harm upon removal, notwithstanding the Board's earlier determination that the applicant is a Convention refugee, it is well established that the fact that an individual was previously found to be a Convention refugee is not a sufficient basis to establish present risk of harm: *Nagalinam*, above, at para. 25; *Camara v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 168 at para. 58; *Jeyarajah v. Canada (Minister of Citizenship and Immigration)* (1999), 236 N.R. 175 at para. 12 (F.C.A). Accordingly, this aspect of the applicant's argument cannot succeed.

[16] The reconsideration opinion under review is 22 pages in length. The Minister's delegate's findings concerning the applicant's risk upon return to Egypt comprise 16 pages of the opinion. The Minister's delegate considered the applicant's risk at the time of his alleged torture and separately considered his risk upon refoulement. The crux of the applicant's argument is that, owing to his previous involvement in the Muslim Brotherhood, he would be subject to a death sentence or torture upon his return to Egypt.

1995 Medical Examination confirms the applicant was tortured

[17] A Canadian medical report dated September 12, 1995 reported on a medical examination of the applicant to document injuries the applicant allegedly sustained as a result of torture while in Egypt. This medical report was used before the Refugee Board. This medical report describes in detail evidence that the applicant sustained cigarette burns to both hands, his left foot and his left cheek. It also confirmed a linear scar on the instep of his right foot which is consistent with his allegation that he was beaten with a wire whip. The medical report also confirmed evidence of a 2.5 cm scar on his head, consistent with his allegation that he was hit in the head with a large piece of metal. Finally, the applicant alleged that he had several toenails removed as part of the torture. The medical report confirms on the left foot, the second and fifth toes have evidence of prior removed toenails. The medical report indicated that the doctor asked the applicant to obtain x-rays of his skull and his elbow to further elucidate the nature of his injuries. The applicant did not do this, possibly because he was granted refugee status shortly thereafter receiving this report. The reconsideration opinion under review carefully describes this medical report and its findings but concluded at page 21 of the report:

> … Upon careful reading of the doctor's report, he only confirms certain forms of abuse, others are inconclusive. He asked Mr. Al Kafage to get an x-ray done and he did not. In my view, the x-ray would have been useful in arriving at a final determination of the injury suffered. In failing to obtain the x-ray, he has placed his credibility on the issue in question. Therefore, I am not satisfied that all of the abuse alleged by Mr. Al Kafage took place.

[18] The conclusion of the Minister's Delegate that the applicant is not credible with respect to the torture that he experienced is patently unreasonable. The medical evidence confirms that the applicant was tortured. This in turn confirms that the applicant was taken into custody by the Egyptian authorities and tortured for some reason. The reconsideration report stated at page 21:

> I assign little weight to Mr. Al Kafage's allegation that he was detained and tortured or did not have a trial and was sentenced to death because of his membership in the Muslim Brotherhood.

As discussed above, this finding that the applicant was not detained and not tortured is patently unreasonable in view of the medical evidence.

Torture continues in Egypt

[19] The reconsideration report states that torture is still being employed by police security personnel and prison guards in some cases but that there is no indication that members of the Muslim Brotherhood are tortured. At the same time, the reconsideration report states that in 2005, security forces arrested and detained hundreds of Muslim Brotherhood members. Whether torture is being utilized against members of the Muslim Brotherhood is not documented. For this reason, the Court must also find that the reconsideration report's conclusion that the applicant will not be personally at risk of torture by reason of his membership in the Muslim Brotherhood is not clear on the evidence before the Minister's Delegate.

CONCLUSION

[20] While the applicant bears the onus of establishing that there are substantial grounds upon which to believe that if removed to Egypt he would be in danger of torture, death, or cruel and unusual punishment, it is not reasonable for the applicant to provide more than proof that he was in fact tortured, that members of the Muslim Brotherhood are still being arrested and detained, and that torture still exists in Egypt. In other cases before this Court the respondent initiated steps to obtain assurances from the Government of Egypt that a particular individual would not be at risk if deported to Egypt, or the respondent made independent inquiries. In the case at bar, no assurances were sought and no inquiries were made about whether the applicant was being sought by Egypt as he alleges, or if he would be at risk.

[21] For these reasons, the Court must conclude that material aspects of the "Decision on Risks" are patently unreasonable and that the reconsideration opinion with respect to risk must be set aside.

[22] Neither party proposes a question for certification. No question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. this application for judicial review is allowed;

2. the reconsideration of the Minister's Opinion dated September 25, 2006 is set aside with respect to risk to the applicant if returned to Egypt; and,

3. this matter is referred to another Delegate of the Minister to reconsider the risk the applicant would face if returned to Egypt.

"Michael A. Kelen"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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