Date: 20080221

Docket: IMM-1193-07

Citation: 2008 FC 227

Ottawa, Ontario, February 21, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

CRAIGTHUS ANTHONY LEVEL
By his litigation guardian Sharlene Level

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of an Enforcement Officer's decision dated March 20, 2007 denying the applicant's request to defer his removal from Canada. On March 12, 2007 the applicant requested that removal be deferred until a decision is rendered on his application for permanent residence on humanitarian and compassionate grounds (H&C application). The H&C application was only received by the respondent on March 13, 2007.

FACTS

[2] The applicant, a 36-year-old Jamaican citizen, was sponsored by his father for Canadian permanent residency in 1988. Sharlene Level is the applicant's litigation guardian and younger sister. The applicant suffers from schizophrenia and is currently receiving treatment, which includes the anti-psychotic drug risperidone. He is monitored by a psychiatrist and receives significant support from both his sister and his father.

[3] On October 25, 2004, the applicant was convicted of two counts of sexual assault. It was while incarcerated that the applicant was diagnosed as schizophrenic. As a result of the convictions, the applicant is now inadmissible to Canada pursuant to paragraph 36(1)(a) of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (IRPA). Accordingly, he is subject to a Removal Order, which was issued on June 17, 2005.

[4] On March 9, 2006, the applicant's appeal to the Immigration Appeal Division (the IAD) was dismissed for lack of jurisdiction pursuant to subsection 64(2) of the IRPA. On July 20, 2006, the applicant's leave application to judicially review the IAD decision was dismissed. A subsequent Pre-Removal Risk Assessment (PRRA) application was refused on October 19, 2006. The applicant states that while he filed the PRRA forms, he did not file any personal information, submissions, or evidence in support since he was not aware of the importance of the PRRA. The applicant was not represented by counsel at the time and no application for judicial review of the PRRA decision was filed. The applicant's confusion is somewhat confirmed in the PRRA officer's reasons, which state:

> In his PRRA application the applicant does not state why he has submitted a PRRA application. He does not provide any risk. …

> The applicant has submitted a PRRA application however, he has not indicated why he fears returning to his native country Jamaica.

The PRRA officer reviewed the Jamaica country conditions and concluded the applicant would not be "subjected personally to a risk of life or to a risk of cruel and unusual treatment or punishment" if returned to Jamaica. Of course, without the benefit of any personal documentation, the PRRA officer was not aware of the applicant's personal situation and history of mental illness.

[5] On March 12, 2007, the applicant requested that the Canada Border Services Agency (the CBSA) defer his removal from Canada until a final decision is rendered in his H&C application, which was received by the respondent on March 13, 2007. Other submissions raised by the applicant included:

1. that the applicant never received a risk assessment considering the actual risk of harm he may be subject to upon return to Jamaica;

2. that the applicant would not receive adequate psychiatric care if returned to Jamaica; and

3. that the applicant had retained a lawyer to assist him in appealing his criminal sentence.

Decision under review

[6] On March 20, 2007, an Enforcement Officer denied the applicant's request for a deferral. After considering the applicant's submissions, the Enforcement Officer concluded:

> I do not feel the factors presented warrant a deferral of removal. In this regard, the [CBSA] has an obligation under section 48 of the [IRPA] to carry out removal orders as soon as reasonably practicable.
>
> Based on the information presented by counsel and after careful consideration, I have come to the following decision with regards to this deferral request[.]

> I am not satisfied that a deferral of the execution of the removal order is appropriate in the circumstances of this case.

In coming to this conclusion, the Enforcement Officer obtained medical information about Jamaica from the CBSA's Medical Services Branch in Ottawa. This Branch provided information about the availability of the applicant's drug in Jamaica and the availability of psychiatric care in Jamaica. The Enforcement Officer's decision set out in detail the psychiatric care available with names and telephone numbers in Jamaica. With this extrinsic information, the Enforcement Officer concluded that the applicant "can receive the necessary care he requires in Jamaica."

[7] The applicant's removal was scheduled for March 29, 2007. However, the Court stayed the execution of the applicant's Removal Order until this application is considered and determined.

ISSUE

[8] The Court is satisfied that the only issue raised in this application is: Is the medical evidence obtained by the Enforcement Officer from the Medical Services Branch "extrinsic evidence" that the Enforcement Officer had a duty to inform the applicant of and to give the applicant a fair opportunity of correcting or contradicting before making her decision?

STANDARD OF REVIEW

[9] The issue to be considered concerns matters of natural justice and procedural fairness, which are questions of law subject to the standard of correctness. In such cases, the Court must "examine the specific circumstances of the case and determine whether the [decision maker] in question

adhered to the rules of natural justice and procedural fairness": *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 16, [2006] 3 F.C.R. 168 at paragraph 15. In the event that a breach is found, no deference is due and the decision will be set aside: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392.

[10] With respect to the merits of the decision, the authority granted to an Enforcement Officer is contained in section 48 of the IRPA, which states:

48. (1) A removal order is enforceable if it has come into force and is not stayed.	**48. (1)** La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.	**(2)** L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

[11] There is conflicting opinion in the jurisprudence concerning the appropriate level of deference to accord to the merits of an Enforcement Officer's decision. Many decisions of the Court have found that the appropriate standard of review is patent unreasonableness: see *Hailu v. Canada (Solicitor General)*, 2005 FC 229, 27 Admin. L.R. (4th) 222; *Zenunaj v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1715, [2005] F.C.J. No. 2133 (QL); and *Haghighi v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 372, 289 F.T.R. 150. In accordance with this standard, an Enforcement Officer's decision will only be set aside if found to be "clearly irrational" or "evidently not in accordance with reason": *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247.

[12] However, other decisions have concluded that the appropriate standard of review is that of reasonableness *simpliciter*: see *Adviento v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1430, 242 F.T.R. 295; *Ragupathy v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1370, 303 F.T.R. 178; and *Cortes v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 78, [2007] F.C.J. No. 117 (QL).

[13] In *Ragupathy*, above, I stated that the standard of patent unreasonableness is often applied where the question before the Enforcement Officer turns on fact alone. In any event, the only issue is one of procedural fairness subject to the correctness standard of review.

ANALYSIS

Issue: **Is the medical evidence obtained by the Enforcement Officer from the Medical Services Branch "extrinsic evidence" that the Enforcement Officer had a duty to inform the applicant of and to give the applicant a fair opportunity of correcting or contradicting before making her decision?**

[14] The Enforcement Officer's decision was based, in part, on an assessment of the applicant's medical information by the CBSA's Medical Services Branch. That assessment was made to aid the Enforcement Officer in reaching a decision as to whether the applicant would receive adequate psychiatric care if returned to Jamaica. The Enforcement Officer stated at page 3 of her Reasons:

> Medical information that accompanied this deferral request and the information on file was sent to the Medical Services Branch for their assessment and evaluation regarding this case. The Medical Services Branch indicated that the drug, risperidone was available in Jamaica. The Medical Services Branch also indicated that psychiatric care is available in Jamaica.

[15] The applicant submits that the assessment and opinion rendered by the Medical Services Branch constitutes “extrinsic evidence” that should have been shared with the applicant for comment, and that the Enforcement Officer’s failure to do so amounted to a breach of procedural fairness. In support, the applicant cites the decision in *Dasent v. Canada (Minister of Citizenship and Immigration)* (1994), 87 F.T.R. 282, where Mr. Justice Rothstein, sitting as a Trial Judge, stated at paragraph 20 about “extrinsic evidence”:

> ¶ 20 … In the case at bar, having regard to the words “not brought forward by the applicant” used by Hugessen, J.A., to qualify the term “extrinsic evidence”, and his reference to *Muliadi*, I interpret the term “extrinsic evidence not brought forward by the applicant” as evidence of which the applicant is unaware because it comes from an outside source. This would be evidence of which the applicant has no knowledge and on which the immigration officer intends to rely in making a decision affecting the applicant. While this would include information obtained from an outside party as in *Muliadi*, I fail to see why it would not also include evidence from a spouse obtained separately from the applicant, or other information in the immigration file that did not come from the applicant, of which the applicant could not reasonably be expected to have knowledge.
>
> ¶ 21 The relevant point as I see it is whether the applicant had knowledge of the information so that he or she had the opportunity to correct prejudicial misunderstandings or misstatements. The source of the information is not of itself a differentiating matter as long as it is not known to the applicant. The question is whether the applicant had the opportunity of dealing with the evidence. This is what the long-established authorities indicate the rules of procedural fairness require. In the well known words of Lord Loreburn L.C. in *Board of Education v. Rice*, [1911] A.C. 179 (H.L.) at page 182:
>
> > They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

[16] Based on this interpretation, the applicant submits that the evidence of the Medical Services Branch was “extrinsic evidence” since it was unknown to the applicant when the Enforcement Officer rendered her decision and was critical in the determination not to defer the applicant’s removal. Accordingly, the applicant submits that his rights to procedural fairness were breached by not being granted an opportunity to comment on the opinion of the Medical Services Branch.

[17] The applicant also relies on the Federal Court of Appeal decision in *Muliadi v. Canada (Minister of Employment and Immigration)*, [1986] 2 F.C. 205 (C.A.), and the Court of Appeal decision in *Haghighi v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 407 (C.A.) per Evans J.A. at paragraphs 26-27:

> ¶ 26 Fifth, in addition to the admonition that immigration officers owe more than a minimal duty of fairness … *Baker*, *supra*, also restored to the mainstream of procedural fairness analysis the task of determining the content of the duty of fairness owed by immigration officers when making inland H&C decisions. The question is whether the disclosure of the report was required to provide Mr. Haghighi with a reasonable opportunity in all the circumstances to participate in a meaningful manner in the decision-making process.
>
> ¶ 27 Hence, in deciding whether disclosure … is required, the Court must consider, *inter alia*, the factors identified by L’Heureux-Dubé J. for locating on the fairness spectrum the duties owed by the immigration officer … The inquiry into what is required to satisfy the duty of fairness must be contextualized: asking … whether the report can be characterised as “extrinsic evidence” is no longer an adequate analytical approach.

[18] The efficient administration of section 48 of the IRPA dictates that disclosure should not generally be required. By the time a deferral request is made, the individual facing deportation is

likely to have already exhausted the many other avenues available to them under the IRPA, each of which contains its own set of procedural safeguards. Accordingly, requiring an Enforcement Officer to inform the applicant of the expert opinion of the Medical Services Branch, and to further allow the applicant to comment on that opinion, would undermine the efficiency of the immigration process. As the respondent states, to require what the applicant suggests would impose a procedural formality on Enforcement Officers inimical to the proper performance of their statutory duties.

[19] The Enforcement Officer is statutorily bound to remove the applicant as soon as reasonably practicable. However, if the Officer relies on extrinsic evidence not brought forward by the applicant, the applicant must be given an opportunity to respond to that evidence. That is the minimal duty of procedural fairness. In the application at bar, the Enforcement Officer relied on detailed evidence about medical conditions in Jamaica that the applicant contested in an Affidavit of Melinda Gayda, filed in support of the applicant's successful motion for a stay of removal.

[20] I question whether the Enforcement Officer ought to have conducted a "mini H&C" by investigating the medical services available for the applicant in Jamaica before deciding whether to defer the removal of the applicant pursuant to section 48 of the IRPA. The decision with respect to deferral is not a "mini H&C." The respondent argues that a decision under section 48 is a "pressure cooker" decision with tight time frames, and the Enforcement Officer should not be expected to provide the applicant with an opportunity to respond to information obtained by the Enforcement Officer in making the decision. The Court cannot agree. If the Enforcement Officer is relying on extrinsic evidence, the duty of fairness applies. However, in most situations the Enforcement

Officer does not need to rely on extrinsic evidence in making a decision. As I indicated, I do not think the Enforcement Officer needed to obtain the information about the medical services available in Jamaica before deciding whether to defer the removal of the applicant.

[21] With respect to tight time frames, the applicant has been in Canada for 20 years, and the duty of fairness should not be sacrificed because of an artificial deadline established by the respondent for the applicant's removal. There is no harm in allowing the applicant another week or two in order to respond to extrinsic evidence upon which the Enforcement Officer intends to rely. If that extrinsic evidence is incorrect, the applicant will suffer great harm.

Mootness

[22] Both parties urged the Court not to dismiss this application for mootness. I do think the case is moot since, at this point of time as a result of the stay, there is no effective removal order. However, I agreed to consider this principle of procedural fairness since it is an important point of contention between the parties and is not moot in that respect. At the same time, I do not agree that this matter raises a serious issue of general importance that has not already been decided by the jurisprudence. In my view, the jurisprudence has established unequivocally that the duty of procedural fairness applies to important extrinsic evidence being relied upon by an administrative decision maker regardless of whether it is with respect to a decision not to defer the removal or to some other decision under the IRPA. For that reason, I will not certify any question in this application.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is allowed, and the decision of the Enforcement Officer is set aside and referred back to the respondent to undertake an updated PRRA, and then, if necessary, a decision to remove the applicant.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1193-07
STYLE OF CAUSE:	CRAIGTHUS ANTHONY LEVEL By his litigation guardian Sharlene Level v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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