Date: 20081201

Docket: IMM-2227-08

Citation: 2008 FC 1341

Vancouver, British Columbia, December 1, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

HUGO FRANKLIN VILLANUEVA CRUZ
aka
HUGO FRANKLIN VILLANEUVA CRUZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Mr. Hugo Franklin Villanueva Cruz, is a citizen of El Salvador who came to Canada in 1997 and was found to be a Convention refugee in 1999. On March 17, 2006, he was convicted of Trafficking in a Controlled Substance and sentenced to serve three years and ten months. In a decision dated October 17, 2007, a delegate of the Minister of Citizenship and Immigration (the Minister's delegate) determined that the Applicant constituted a danger to the

public in Canada pursuant to s. 115(2)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). The Applicant seeks judicial review of that decision.

[2] The Applicant raises three issues:

1. In making the danger assessment, did the Minister's delegate err by failing to have regard to evidence of the Applicant's rehabilitation and his low risk of re-offending?
2. In making the danger assessment, did the Minister's delegate impose too high a burden of proof on the Applicant to show that he was not a risk to re-offend?
3. In determining whether that there were insufficient humanitarian and compassionate grounds to overcome his removal from Canada, did the Minister's delegate fail to adequately consider the best interests of the Applicant's Canadian children?

[3] Having reviewed the record and the oral and written submissions of the parties, I am not persuaded that the Minister's delegate erred by imposing too high a burden or by failing to consider the best interests of the children. However, it is not necessary to make final determinations on these two issues since I conclude, for the reasons set out below, that the Minister's delegate erred by failing to have regard to certain of the evidence related to the Applicant's danger assessment. On this basis, the decision was unreasonable and should be overturned.

[4] The test to be used by the Minister in forming a danger opinion was summarized by Justice Strayer in *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 (C.A.) at paragraph 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. [Emphasis added]

[5] Justice Beaudry offered further comments on this standard as it related to individuals convicted of narcotics-related offences *Do v. Canada (Minister of Citizenship and Immigration)*, [2003] 2 F.C. 493 at paragraphs 42-43:

> This Court has consistently held, including in cases dealing with narcotics-related offences, that the mere fact of conviction on one or more criminal offences does not itself support a determination that a person is, may be, or is likely to pose a danger to the public, although some offences by their nature may be of a type that invite such a conclusion: *Salilar v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 150 (T.D.) at page 159; *Thai v. Canada (Minister* [page 510] *of Citizenship and Immigration)* (1998), 42 Imm. L.R. (2d) 28 (F.C.T.D.) at paragraph 16; *Tewelde v. Canada (Minister of Citizenship and Immigration)* (2000), 89 F.T.R. 206 (F.C.T.D.).
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> Rather, in forming an opinion as to whether an individual constitutes a danger to the public, natural justice and procedural fairness require the Minister to take into account all of the relevant and particular circumstances of each case, and the circumstances of each case must, over and above the conviction, indicate a danger to the public: *Fairhurst v. Canada (Minister of Citizenship and Immigration)* (1996), 124 F.T.R. 142 (F.C.T.D.) at paragraph 10; *Thompson v. Canada (Minister of Citizenship and Immigration)* (1996), 41 Admin. L.R. (2d) 10 (F.C.T.D.) at paragraph 19.

[6] In reaching her conclusion that the Applicant was a present and future danger to the public, the Minister's delegate wrote:

> [The Applicant] has committed and has been convicted of one major crime - trafficking. Although he has expressed remorse for his action and seems to display exemplary behaviour in the prison setting, I am not convinced that this one time act could not happen again. The 46 month sentence imposed by the judge is significant and indicates the grave seriousness of his offence. Prior to the offence, Mr. Villanueva Cruz did not seem to have a steady lifestyle by continually residing in a certain area or having continuous employment in any field for any length of time. After arrival, he was on social assistance, then had seasonal employment at a Fencing company for four months each summer, then worked at various labor type jobs…
>
> In rendering my decision that Mr. Villanueva Cruz is a danger to the public in Canada, I fully realize that I am basing my decision on a single conviction. Despite some positive reinforcement in Mr. Villanueva Cruz's life such as a supportive ex-mother-in-law, his children and a possible future employer, these same factors were not sufficient to keep him at bay from a huge criminal act. It is my opinion based on the information before me that he could reoffend and traffic in a drug, promoting an unwanted, dangerous drug into the community and society. This remains foremost in my mind when making a determination that he is a present and future danger to the public in Canada.

[7] The evidence before the delegate included the following:

- The Applicant had one conviction for trafficking and was sentenced to 46 months; he had no prior convictions.
- Following his arrest in 2004, he was released on bail and remained in the community for over a year and a half without incident, meeting all the conditions of his bail.
- The Applicant was granted full parole after serving only 15 months of his 46-month sentence. As indicated in the "Criminal Profile Report," Correction Services found that the

Applicant was a strong candidate for reintegration. The report also found:

  - His criminality related mainly to his financial pressure and manipulation by criminal associates;
  - He was not a member or an affiliate of any gang; and
  - He exhibited pro-social tendencies and high motivation to follow his correctional plan.

- The Applicant had not been charged with any other offences since being released on parole.

[8] The delegate's decision centered on the Applicant's motivation to commit the crime. Based on the evidence, the delegate concluded (reasonably, in my opinion) that the Applicant was motivated to commit the offence by financial stresses. Since he was not in a better financial position at the time of the danger opinion, the Minister's delegate found that there was no evidence to conclude that he would not re-offend. However, in my view, this finding fails to take into account the evidence that the Applicant had made arrangements to address the financial stresses that led to the commission of the original trafficking offence; specifically, he planned to accept employment (which apparently had been guaranteed) in the construction industry.

[9] This evidence was not adequately addressed by the Minister's delegate. The only reference that the delegate made to the Applicant's potential future employment was found in her conclusion: "despite some positive reinforcement in Mr. Villanueva Cruz's life such as a supportive ex-mother-in-law, his children and a possible future employer, these same factors were not sufficient to keep him at bay from a huge criminal act." Reading this part of the decision, it seems that the delegate

misconstrued the evidence by assuming that the Applicant had employment options available to him at the time he committed the offence. In fact, there is no support for this based on the evidence. More importantly, this indicates that the delegate failed to properly consider this evidence as part of her conclusion that the Applicant's financial situation had not changed for the better following his incarceration.

[10] There are other problems with the delegate's decision. In concluding that the Applicant "could re-offend and traffic in a drug", the Minister's delegate makes no reference to much of the evidence that supports his claim of rehabilitation. For example, the Applicant was out on bail, in the community, and crime free for 18 months, prior to his conviction. The "Criminal Profile Report", prepared for his intake into incarceration, makes reference to the low likelihood that he would re-offend. He was given early release from custody, partly on the basis of a low risk of re-offending.

[11] Finally, it also appears that the Minister's delegate relied on her conclusion that the Applicant was "submerged with associates in the drug trade" to support her overall finding that the Applicant was likely to re-engage in drug-related crimes. In my view, the finding that the Applicant was "submerged" in the drug trade is capricious or made without regard to the evidence. While the Applicant may have, at the time of his crime, associated with participants in the drug trade and had used cocaine, there was no evidence that he was ever "submerged" in this world of crime. In any event, there is even less evidence that would lead the delegate to conclude that, subsequent to his incarceration, he had continued these associations.

[12] For these reasons, I find that the decision of the Minister's delegate was unreasonable and the application for judicial review will be allowed.

[13] I wish to be clear that, by my decision, I am not concluding that this Applicant cannot be found to be a danger to Canada. I am also not opining that a danger opinion cannot follow a single conviction. However, in order to do so, it is imperative that the Minister's delegate have regard to the evidence before him or her. In this case, that was not done.

[14] Neither party proposed a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed and the matter sent back to the Minister for re-determination by a different Minister's delegate; and
2. No question of general importance is certified.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2227-08
STYLE OF CAUSE:	HUGO FRANKLIN VILLANUEVA CRUZ v. MCI et al.
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