Date: 20090225

Docket: IMM-2200-08

Citation: 2009 FC 200

Ottawa, Ontario, February 25, 2009

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

JAMES WAJARAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application by James Wajaras seeks to set aside a decision of Immigration Division of the Immigration Refugee Board (Board) that found him to be inadmissible to Canada on the ground of serious criminality in accordance with ss. 36(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (IRPA).

I. Background

[2] Mr. Wajaras is a citizen of Sudan. He entered Canada from Eritrea in 1997 as a Convention refugee and was granted permanent resident status at that time. On September 10, 2001,

Mr. Wajaras committed a serious assault upon a female acquaintance. Later that year he was criminally charged and on October 7, 2005 he was sentenced to 3 years imprisonment.

[3] On November 18, 2005 the Canada Border Services Agency (CBSA) made an inadmissibility report to the Minister of Citizenship and Immigration under ss. 44(1) of the IRPA advising that, by virtue of his criminal conviction, Mr. Wajaras was inadmissible to Canada. This report led to the referral of Mr. Wajaras' case for an admissibility hearing before the Board under ss. 44(2) of the IRPA.

[4] On April 6, 2006 the CBSA advised Mr. Wajaras of its intention to have him declared a danger to the public. Notwithstanding his refugee status, such a finding would have permitted his return to Sudan in the event that he was also determined to be inadmissible. On January 8, 2008 the Minister determined that Mr. Wajaras did not represent a danger to the public. In the result Mr. Wajaras cannot now be returned to the Sudan even thought he has been determined to be inadmissible and is the subject of a corresponding removal order.

[5] Mr. Wajaras' sole substantive submission to the Board was that it was an abuse of process for the Minister to seek a removal order against him with the resulting loss of permanent resident status in circumstances where his removal could not be lawfully effected.

The Board Decision

[6] The Board rejected the abuse of process argument and found Mr. Wajaras to be inadmissible. This finding led the Board to state that it had no alternative but to order his deportation from Canada. The Board's treatment of the abuse of process argument is contained in the following passage from its oral decision:

> This matter has been put before the Minister already and the Minister has come back with a decision that you are not a person who poses a danger to the public and so even if a Deportation Order is issued to you at this time that Deportation Order cannot be enforced because you cannot be removed to the country from which you came where you would be at risk of persecution and so your counsel suggests that going to this hearing at this time is tantamount or is an abuse of process because it would appear in his – in his mind that – in your counsel's opinion that the Minister is simply seeking a Deportation Order so that the Minister can have a Deportation Order to, so to speak, hang over your heard (*sic*) to ensure that you behave in the future because – and not do anything or engage in any type of behaviour that may give the Minister grounds to change his opinion that pose a danger to the – to the public and then you become removable.
>
> I have considered this carefully and, with respect, I do not agree with your counsel. I do not believe that this is a circumstance which amounts to an abuse of process. It would seem to me that in order to establish that something amounts to an abuse of process one would have to – one would have to show that it is being done with some animosity or malice towards you and I don't see that there is either of those – either of those in this particular case.
>
> Yes, if you are issued with a removal order, no, you will not be removable to your country, your former country of citizenship where you would be at risk of persecution but you still could be removed to another country. Maybe the Minister doesn't have another country to remove you to at this time but that doesn't mean that some point in time in the future the Minister may not find an alternative to removal to your country of citizenship and remove you to another country. That is still a distinct possibility. It might be somewhat speculative but it's no more speculative than to suggest that proceeding with a hearing for the purposes of having a Deportation Order issued to you

> when you can't be removed to your own country of citizenship would be – is an abuse of process.

II. Issues

[7] Did the Board err in rejecting the Applicant's abuse of process argument?

III. Analysis

[8] Mr. Matas is correct that the Board erred in law by stating that the doctrine of abuse of process requires evidence of malice or animus. Notwithstanding that error, a question remains as to whether an abuse of process argument can be sustained on this record. In my view it cannot and the Board's mistake is, therefore, of no consequence.

[9] Mr. Wajaras argues that the Minister was obliged to terminate the admissibility process once Mr. Wajaras was found not to be a public danger. The continuation of that process is said to be an abuse of process because Mr. Wajaras is left without any recognized form of residency status. He remains a refugee but not a permanent resident. Although he cannot now be removed from Canada, he claims to face many practical hurdles in accessing government services. He cannot work or travel outside of Canada unless the Minister grants him those rights on a periodic basis. He has no realistic prospects for regularizing his status here or for obtaining citizenship. In effect, he is in a state of administrative limbo which, according to Mr. Matas, is antithetical to the purposes of the IRPA. This is the basis of the abuse of process argument. For the sake of argument I am prepared to consider this issue on the basis of the standard of correctness.

[10] It must first be noted that there is no evidence that the decision taken by the Minister to pursue an inadmissibility finding against Mr. Wajaras was improperly motivated. That process was initiated in the ordinary course shortly after Mr. Wajaras was convicted in October 2005 and it concluded with the Board's decision on April 30, 2008. There was, accordingly, no evidentiary basis for the Board to question the motives of the Minister in seeking a deportation order against Mr. Wajaras.

[11] The caselaw indicates that to the extent that any discretion exists to consider mitigating, aggravating or humanitarian factors in the process of determining the inadmissibility of a permanent resident, it does so at the point of the preparation of an admissibility report under ss. 44(1) or in the making of a referral to the Immigration Division under ss. 44(2) of the IRPA: see *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, 271 F.T.R. 257. Even at that I question whether much discretion can be assumed in light of the comments of the Federal Court of Appeal in *Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 F.C.R. 409. But, in any event, once the matter comes before the Immigration Division, the question for determination is only whether the person is inadmissible on the ground of serious criminality. The Immigration Division's admissibility hearing is not the place to embark upon a humanitarian review or to consider the fairness or proportionality of the consequences that flow from a resulting deportation order. Those are consequences that flow inevitably by operation of law and they impart no mitigatory discretion upon the Immigration Division. This same point was made by Justice Judith Snider in her comprehensive review of these provisions of the IRPA in *Hernandez*, above, where, at para. 47, she said:

> 47 However, the options of the Immigration Division upon the s. 44(2) Referral, in a case of serious criminality, appear to be very limited. Section 45(d) requires the Immigration Division to "make the applicable removal order against a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible". As discussed earlier in these reasons, under s. 36(1) of the IRPA, the Applicant is inadmissible; there is no room for any other finding. Once the s. 44(2) Referral is made to the Immigration Division, the only outcome of the inquiry, that I can see, is a removal order. Finally, an appeal to the IAD has been removed for persons in the position of the Applicant. Thus, the only power to prevent the Applicant's removal rested with the immigration officer and the Minister's delegate. Only if either one or the other of these two officials had decided not to take further action would the Applicant be able to avoid the issuance of a removal order under s. 45(d).

[12] I also cannot identify anything about this case which distinguishes it from the decisions rendered in *Kalombo v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 460, 231 F.T.R. 267, or *Argueles v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1477, [2004] F.C.J. No. 1777. *Kalombo* involved a similar situation where a permanent resident was ruled to be inadmissible owing to serious criminality. Although no danger opinion had been sought, the Applicant could not be deported because of a moratorium on removals to the Democratic Republic of the Congo. The Applicant argued that the Minister's conduct in seeking a removal order was motivated by an unlawful or improper purpose. In substance this was the same argument now advanced by Mr. Wajaras. This argument was dismissed by Justice Luc Martineau who held that the deportation order arose by operation of law upon proof of the requisite level of criminality. It is at least implicit in this finding that it was not open to the Board to reflect upon the motives or the reasons for the case being brought before it.

[13] The decision in *Kalombo* was applied in *Argueles* for the point that the validity of a removal order is not subject to its enforceability (see para. 23). Similarly, the validity of the removal order obtained against Mr. Wajaras is not dependant upon whether it can now or ever be executed. The Applicant effectively seeks to connect the two issues by suggesting that the inadmissibility process ought to have been halted by the Minister as soon as it was found that Mr. Wajaras was not a danger to the Canadian public. There is no legal basis for such an argument and the Board was right to reject it.

[14] The simple answer to Mr. Wajaras' complaint is that he has created this problem for himself. There are consequences under the IRPA for permanent residents who are guilty of serious criminality. But for Canada's recognition of the principle of non-refoulement, Mr. Wajaras would have been deported for his criminal behaviour. The consequences for an individual who has abused the privilege of Canadian residency are not a secret. They are, in fact, statutorily mandated and, as such, their application in cases like this one cannot constitute an abuse of process. Mr. Wajaras is not the victim of an uncaring or abusive bureaucracy. Rather, he is solely responsible for the position he now finds himself in. But he is also not without potential future recourse. If administrative decisions are made which unlawfully interfere with his interests, including the opportunity to work, he has the right to seek judicial relief. If he stays out of legal trouble, enhances his Canadian establishment and continues to make positive social and economic contributions, he will be in a position at some point to pursue humanitarian and compassionate relief under s. 25 of the IRPA: see *Hernandez*, above, at para. 59.

[15] I also do not believe that an abuse of process argument can be built around selective references to the purposes of the IRPA. That legislation serves many purposes not the least of which is protecting Canadians by imposing consequences for the criminal behaviour of a few of those who have emigrated here.

IV. Conclusion

[16] I can find no error in the Board's decision and this application is, accordingly, dismissed.

[17] Mr. Matas had expressed an interest in drafting a certified question. Although he has provided me with some suggestions in that regard, I will allow him a further 7 days to draft any question which he believes is in conformity with these reasons. In that event, I will allow the Respondent a further 7 days to reply.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed.

" R. L. Barnes "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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