Federal Court  Cour fédérale

Date: 20100730

Docket: IMM-3998-09

Citation: 2010 FC 794

Ottawa, Ontario, July 30, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ABADIR ALI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Abadir Ali applies for judicial review of the June 30, 2009 decision by the Minister's Delegate concluding he constitutes a danger to the Canadian public. The Delegate also found Mr. Abadir Ali would neither face a serious possibility of persecution, nor risk to his life or cruel or unusual treatment on being returned to Somalia.

[2] On May 9, 2008 the Minister served Mr. Abadir Ali with notice of the intention to seek an opinion inquiring into whether he constituted a danger to the Canadian public and whether he

could be removed to Somalia. On June 30, 2009 the Minister's Delegate found Mr. Abadir Ali to be a danger to the public pursuant to paragraph 115(2)(1) of IRPA. Mr. Abadir Ali applies for judicial review of that decision.

[3] Mr. Abadir Ali also commenced a separate judicial review of the September 21, 2009 refusal by an Enforcement Officer to defer his removal to Somalia. In refusing Mr. Abadir Ali's request for deferral, the Enforcement Officer relied upon the Minister's Delegate assessment of risk. Mr. Abadir Ali received a stay of his removal pending the hearing of this judicial review as well as the judicial review of the refusal to defer removal.

[4] I heard both judicial review applications concerning the Danger Opinion, IMM-3998-09 and the Refusal to Defer Removal, IMM-4721-09. I will address the latter in a separate decision.

Background

[5] The Applicant is 26 years old. He was eight years old in 1991 when he entered Canada as a dependent of his stepmother. They were accepted as Convention refugees from Somalia in October 1992 and he became a permanent residence of Canada on May 28, 1993.

[6] As a youth, he was convicted of several *Criminal Code*, C-46 (CC) offences:

i.	October 12, 1995	Assault with a Weapon
ii.	December 12, 1995	Mischief under $5,000.
iii.	December 10, 1996	Assault
iv.	November 8, 2001	Assault.

[7] On February 10, 2004 Mr. Abadir Ali became the subject of an inadmissibility report pursuant to subsection 44(1) of *IRPA* on grounds of serious criminality. On February 16, 2004 Mr. Abadir Ali was arrested and detained. At that time he was awaiting trial on charges of robbery, assault with a weapon and aggravated assault.

[8] On May 12, 2004 a deportation order was issued against him. On May 17, 2004 he filed an appeal against the removal order with the Immigration Appeal Division. This appeal was dismissed.

[9] On December 7, 2004 Mr. Abadir Ali was released from detention on conditions. He was later rearrested for failing to report. He was again released on conditions in November 2006.

[10] On November 23, 2006 immigration officials decided not to seek a Minister's Opinion, they did not proceed with removal, and warned Mr. Abadir Ali to lead a more productive life and stop committing crimes.

[11] On June 11, 2007 an immigration warrant was issued for Mr. Abadir Ali's arrest because he failed to report to Immigration on three occasions. He was arrested June 13, 2007

[12] On January 30, 2008 Mr. Abadir Ali became the subject of an inadmissibility report for further serious criminal convictions. He was transferred from Court hold to Immigration hold. On May 9, 2008 Mr. Abadir Ali was given notice of the intention to seek the opinion of the Minister

that he is a danger to the public and could be removed to Somalia pursuant to subsection 115(2) (a) of *IRPA*.

[13] As an adult, Mr. Abadir Ali was convicted of further criminal offences:

i.	February 4, 2002	Assault causing Bodily Harm s. 267(b) CC, 9 months conditional sentence, 27 months probation
ii.	October 1, 2002	Obstruct Peace Officer, s.129(a) CC, 7 days imprisonment, credit for 2 days pre-sentence custody
iii.	September 21, 2004	Obstruct Peace Officer, s. 129(a) CC, 1 day imprisonment, credit for 45 days pre-sentence custody
iv.	January 3, 2008	Aggravated Assault s. 268, imprisonment 47 days, credit for 160 days pre-sentence custody, 3 years probation

[14] On June 30, 2009 the Minister's Delegate issued her decision concluding Mr. Abadir Ali represented a danger to the public and could be returned to Somalia.

Decision Under Review

[15] The Minister's Delegate concluded the Applicant constitutes a danger to the public in Canada. She found there was insufficient evidence of potential for rehabilitation. The Delegate also found Mr. Abadir Ali would not face any more risk on return to Somalia than would be faced generally by other Somalis.

[16] The Delegate began by reviewing the legislation and case law underlying her mandate to write a Danger Opinion. In addition to the legislative framework, the Delegate also considers the Supreme Court's Decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1. That decision requires her to balance the risk Mr. Abadir Ali faces should he be refouled

to Somalia and the danger to the public should he remain in Canada. She asserts her conclusion must answer this question: “If the risk to the Canadian public outweighs the risk of return and any humanitarian and compassionate considerations, Mr. Abadir Ali may be returned to Somalia pursuant to paragraph 115(2)(1) of *IRPA*.”

[17] The Delegate summarizes Mr. Abadir Ali’s immigration file, his criminal record and a chronology of events. She then considers danger information and the circumstances surrounding his criminal offences. She quotes extensively from Court documents laying out findings in the Applicant’s conviction for a vicious and unprovoked assault on a woman; he injured his victim permanently. She also considered statements made at Mr. Abadir Ali’s sentencing hearing, including the reading of a victim impact statement.

[18] The Delegate explicitly excludes Mr. Abadir Ali’s youth convictions and focuses her attention on the violent nature of his adult offences. She also takes into account his troubled upbringing, addictions and the lack of available resources to address his problems in detention.

[19] The Delegate concludes there is not enough evidence suggesting Mr. Abadir Ali may be rehabilitated. She also finds he has no community support and few, if any, positive influences in his life. She concludes, influenced by the nature and seriousness of his previous offences, that Mr. Abadir Ali is a present and future danger to the public in Canada.

[20] The Delegate then considers submissions from Mr. Abadir Ali with the reasons why he does not want to return to Somalia. He is concerned about the security situation in Somalia and the unavailability of resources, jobs and aid. She considers Mr. Abadir Ali's limited knowledge of the culture and mores in Somalia.

[21] The Delegate concludes there are dangers in Somalia, but they are common to all Somalis. She finds there is no evidence to demonstrate Mr. Abadir Ali would face a personalized risk in the north of the country where there is more stability and plans for democratic elections. She finds there is no evidence Mr. Abadir Ali, once refouled to Somalia, couldn't make his way to more stable places in the country. The Delegate concludes that Mr. Abadir Ali will not be at any more risk than anyone else in Somalia.

[22] With these conclusions set down, the Delegate balanced the individual risk to the Applicant upon refoulement with the danger he poses to Canadian society. She concludes that she is not persuaded Mr. Abadir Ali will be subject to discriminate persecution or a risk to his life or to a risk of cruel and unusual punishment, "should he be removed to Somalia today". The Delegate concludes Mr. Abadir Ali poses a great enough risk to Canadian society to "greatly outweigh" the risks he may face in Somalia.

Legislation

[23] The IPRA provides:

Immigration and Refugee Protection Act, (2001, c. 27)

36. (1) A permanent resident or	36. (1) Emportent interdiction

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;

…

48. (1) A removal order is enforceable if it has come into force and is not stayed.

(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.

…

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

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;

…

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) 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.

…

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
b) soit, si elle n'a pas de nationalité et se trouve hors du

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or

pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;
b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l’incapacité du

medical care.

…

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.

(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
(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

(3) A person, after a determination under paragraph 101(1)(e) that the person's claim is ineligible, is to be sent to the country from which the person came to Canada, but

pays de fournir des soins médicaux ou de santé adéquats.

…

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 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.

(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;
b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

(3) Une personne ne peut, après prononcé d'irrecevabilité au titre de l'alinéa 101(1)e), être renvoyée que vers le pays d'où elle est arrivée au Canada sauf si le pays vers lequel elle sera

may be sent to another country if that country is designated under subsection 102(1) or if the country from which the person came to Canada has rejected their claim for refugee protection.	renvoyée a été désigné au titre du paragraphe 102(1) ou que sa demande d'asile a été rejetée dans le pays d'où elle est arrivée au Canada.

(emphasis added)

Canadian Charter of Rights and Freedoms¸ Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
…	…
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Issues

[24] The Applicant raises the following issues:

1. Was there a breach of the duty of fairness owed by the Minister in forming a "danger" opinion…where document based on the decision were not disclosed to the

Applicant and the Applicant is given no opportunity to respond to it and were document was signed nor submitted or prepared its content by the applicant?"

2. Did the Minister's Delegate err in determining that the Applicant does not face personalized risk upon return to Somalia?

3. Did the Minister's Delegate err in relying on part of the documentary evidence without regard or analysis to the current condition of the country?

4. Are there reasons of the Minister's Delegate's danger opinion adequate?

[25] The Respondent submits these issues:

1. Did the Minister's Delegate provide the Applicant with sufficient procedural fairness?

2. Were the Minister's Delegate's factual findings and assessment of the evidence reasonable?

[26] In my view, the above can be addressed by articulating two issues. First, did the Minister's Delegate afford the Applicant sufficient procedural fairness? Second, was the Minister's Delegate's decision reasonable?

Standard of Review

[27] The Supreme Court of Canada found in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*) that question of fact and mixed questions of fact and law should be afforded a degree of deference and reviewed on a standard of reasonableness.

[28] The Supreme Court developed the notion of reasonableness in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (*Khosa*). Significant deference is owed the Minister's Delegate for factual findings and weighing of the evidence. The Court wrote at para. 59:

> "Reasonableness is a single standard that takes its colour from the context. One of the objectives of Dunsmuir was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (Dunsmuir, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome."

[29] The content of the duty of procedural fairness is a question of law. The application of the *Charter* is a question of law reviewable on the standard of correctness. (*Dunsmuir*)

Analysis

Did the Minister's Delegate afford the Applicant sufficient procedural fairness?

[30] The Applicant submits that the Minister's Delegate did not observe procedural fairness in three ways. First, the Applicant says he was not provided with certain documents that were before

the Delegate when she rendered her decision. Second, the Applicant says the documents disclosed were presented in a confusing manner without markings and numbering of exhibits as required by the "Guide to Proceedings Before the Immigration Division Legal Services". Finally, the Applicant claims the Applicant's previous counsel presented a submission to the Delegate received which had not been reviewed by the Applicant beforehand.

Disclosure of Documents

[31] The Respondent submits that all documents before the Delegate were disclosed to the Applicant. The Applicant was provided with three disclosure packages which the Applicant acknowledged receipt by signature.

[32] A careful review of the Certified Tribunal Record indicates that the Applicant's signature acknowledges receipt of the three disclosure packages on May 9, 2008, December 12, 2008 and March 21, 2009. I am satisfied the Applicant was provided with disclosure of the documents in question.

Organization of Disclosure Packages

[33] The Applicant submits the documents were made up of almost 300 pages, they were not listed and they were confusing. The Applicant submits the disclosure packages were not organized as required by the "*Guide to proceedings before the immigration division legal services*". That guide refers to the Federal Court Rules respecting the form of documents, in particular Rule 24 and indicates that exhibits should be marked and numbered.

[34] The short answer is that the Guide referred to sets out rules and procedures before the Immigration Appeal Division or the Federal Court. These rules and procedures do not set out the procedural requirements in a proceeding before the Minister's Delegate. In addition, the Certified Tribunal Record does not show the documentation to be arranged in a haphazard fashion.

[35] More importantly, the salient documentation concerns the Applicant's personal history and criminal record. This is information the Applicant would be personally aware of and would not find confusing.

Previous Counsel's Submission

[36] Allegations of misconduct are to be treated with great caution by the Court. Notice must be provided to the counsel against whom the allegation is made and the law society to which the counsel belongs. The response of counsel or evidence of a complaint to the law society must accompany the allegations. *Nduwimana v. Canada* (*Minister of Citizenship and Immigration*), 2005 FC 1837 at para. 12.

[37] The Applicant submits he did not sign a submission dated October 21, 2008 to the Delegate which the Delegate relied upon in coming to her decision. The Applicant says he was neither aware of, nor consulted on the submission by his former counsel. The Applicant says he was not able to contact his former counsel while he was in detention at the Innes detention centre. He says he complained to the Law Society of Upper Canada about his former counsel's conduct.

[38] The Respondent says the Applicant was given the opportunity to respond. The Applicant provided written submissions which were signed by the Applicant and faxed to the Delegate on October 21, 2008. The Respondent adds that counsel for the Applicant provided further submissions to the Delegate of April 30, 2009.

[39] The Respondent also submits the Applicant has provided no evidence beyond a bare assertion of a compliant to the Law Society of Upper Canada about his counsel's conduct.

[40] A review of the Certified Tribunal Record discloses the Applicant signed the submission he now disavows. The Applicant has not provided evidence of filing a compliant with the law society beyond his assertion. I find there is no basis for the Applicant's claims of not being consulted on the submissions made to the Delegate.

[41] In result I find that the Applicant was afforded sufficient procedural fairness in the danger opinion process.

Were the Minister's Delegate's factual findings and assessment of the evidence reasonable?

[42] The Applicant alleges the decision is unreasonable because it does not take into account evidence the Applicant considers central to the analysis of the risks he might face in Somalia.

[43] The Respondent submits that the Minister's Delegate's Danger Opinion was reasonable. The Respondent notes that the Minister's Delegate considered the meaning of "danger to the public"

concluding it means an individual is a possible re-offender whose presence in Canada creates an unacceptable risk to the public. She then considered the Applicant's criminal record against that test and found he was a danger to the public.

[44] With respect to the risk on return, the Respondent submits the Applicant has not shown the Delegate overlooked any evidence central to the Applicant's case.

[45] It is well established that a decision maker need not refer to every piece of evidence before her. Decision makers are in error when they fail to refer to evidence central to the case and contrary to the decision. *Cepeda-Guiterrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 at para. 16. That is not the case here.

[46] The Minister's Delegate expressly excluded consideration of the Applicant's criminal record as a youth and only considered the Applicant's adult criminal record. The Delegate considered the Applicant's circumstances, his adult criminal record, his failure to abide by release conditions in regards to both immigration and criminal matters and his failure to rehabilitate in coming to her conclusion on the Danger Opinion.

[47] The Minister's Delegate considered the Applicant's submission that he does not want to return to Somalia because his life would be in danger. She considered the evidence submitted by the Applicant's counsel. She notes the UNHCR considers some forced returns to northern Somalia are possible under certain conditions. She states that she has considered all the evidence on record, the

human rights situation and the volatile humanitarian situation and concludes that while there is hardship on forced removal, her assessment is the Applicant would not face personalized risk. The Minister's Delegate also refers to the evidence weighing against risk.

[48] I agree the general principle set out in *Cepeda-Guiterrez* applies. The Minister's Delegate need not refer to all of the evidence before her. However, she did have regard for evidence central to the case.

[49] I conclude the Minister's Delegate arrived at a reasonable conclusion concerning the risk the Applicant faces on removal to Somalia. I so conclude in light of the Supreme Court's explanation of reasonableness in *Khosa*.

[50] The application for judicial review of the Danger Opinion does not succeed.

[51] Neither the Applicant nor the Respondent has proposed a question of general importance for certification and I see none arising in this application.

Conclusion

[52] Having decided that the Applicant was afforded procedural fairness in the process and the Minister's Delegate's decision concerning the Danger Opinion and the risk of return to Somalia to be reasonable, the application for judicial review of the Danger Opinion is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review of the Danger Opinion is dismissed.

2. I make no order for a general question for certification.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3998-09
STYLE OF CAUSE:	ABADIR ALI and MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 28, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN, J.
DATED:	JULY 30, 2010

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