Federal Court  Cour fédérale

Date: 20110804

Docket: IMM-6803-10

Citation: 2011 FC 976

Ottawa, Ontario, August 4, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

NABIL ALKHALIL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by Nabil Alkhalil made pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for judicial review of a decision of the Respondent Minister's Delegate, wherein it was determined that the Applicant constitutes a danger to the Canadian public under paragraph 115(2)(a) of the IRPA.

[2] Based on the reasons that follow, this application is dismissed.

I. Background

A. *Factual Background*

[3] The Applicant, Nabil Alkhalil, came to Canada in 1990 at the age of 14. He accompanied his father, mother, brothers and sisters, who made a claim for refugee protection upon arrival at Mirabel airport. Although there appears to be no information available from the Immigration and Refugee Board (IRB) about the circumstances of the family's claim, the Ministry of the Attorney General in British Columbia reported that that Alkhalil family immigrated to Canada from Saudi Arabia to escape the Gulf war and the lack of educational resources available to their children. The Applicant was found to be a Convention refugee on August 29, 1991 and became a permanent resident on April 16, 1992.

[4] The Applicant's father was displaced during the 1948 Arab-Israeli conflict and fled to Lebanon as a Palestinian refugee. He eventually moved to Saudi Arabia. As a result, although the Applicant was born in Saudi Arabia, he not a citizen of that country nor is he a citizen of Lebanon. He is stateless. Nonetheless, the Applicant has a right to return to Lebanon as a descendent of a United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) registered Palestinian refugee. He is currently married to a Canadian citizen and has a Canadian-born daughter.

[5] The Applicant was first the subject of an inadmissibility report on April 2, 1998 following a 1997 sentence for Breaking and Entering with Intent to Commit and Indictable Offence. After failing to appear for an immigration inquiry in February 1999, an arrest warrant was issued. The warrant was executed when the Vancouver police arrested the Applicant on January 5, 2000. He was charged with assault with a weapon. As a result, the Applicant was ordered deported. He appealed to the Immigration Appeal Division (IAD) of the IRB and the removal order was stayed under terms and conditions on September 19, 2000.

[6] The Applicant was the subject of an inadmissibility report for a second time on May 14, 2001. This followed a conviction for assault with a weapon and assault causing bodily harm. On June 20, 2002, the IAD decided to prolong the stay of removal that had previously been granted for an additional six years on the same terms and conditions.

[7] Some of the Applicant's criminal history from this period appears to be related to the killing of one of his brothers in 2001. One of his other brothers was also shot and killed in 2003. In 2004, the Applicant and his family moved from British Columbia to Ottawa where the Applicant planned to "start life afresh". Unfortunately, in 2005 one of the Applicant's car detailing stores began to fail financially. He accepted $2500 from an acquaintance to transport drugs from Toronto to Ottawa. However, things did not go according to plan. The Applicant was pulled over by police along highway 401 and, following a high-speed police chase along provincial highways, township roads and residential streets, the Applicant, who had fled the car on foot, was tracked down by a canine unit. A duffel bag was found containing 11 kilograms of cocaine. The street value of the drugs was estimated to be over $330,000.

[8] On February 12, 2008, the Applicant was convicted of possession of cocaine for the purposes of trafficking and dangerous operation of a motor vehicle. As a result, the Applicant's stay was cancelled and, for a third time, an inadmissibility report was written against him on the grounds of serious criminality. A deportation order was subsequently issued.

[9] On January 7, 2009, the Applicant was notified that the Minister was seeking a danger opinion pursuant to paragraph 115(2)(a) of the IRPA. The Applicant was invited to make submissions addressing whether he was a danger to the public, the extent to which he would face a risk of harm if removed from Canada, and any humanitarian and compassionate (H&C) considerations that may exist in his case. The Applicant's submissions were received on July 6, 2009. After receiving the "Request for the Minister's Opinion" package in May 2010, the Applicant made further submissions received by the Respondent on September 22, 2010 and October 6, 2010.

B. *Legislative Provisions*

[10] The principle of non-refoulement is incorporated into Canadian law by subsection 115(1) of the IRPA which prohibits the return of Convention refugees and protected persons to any 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. However, subsection 115(2) expressly provides an exception to this principle where the subject is: (a) found inadmissible on grounds of serious criminality and constitutes, in the opinion of

the Minister, a danger to the public in Canada; or (b) found inadmissible on grounds of security, violating human or international rights or organized criminality if, in the Minister's opinion, 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.

C. *Impugned Decision*

[11] The Minister wrote a 25-page decision, divided into multiple sub-parts. The Minister first considered the applicable provisions of the IRPA and the Applicant's criminal and immigration history. The Minister then proceeded to complete a danger assessment. He considered evidence that the Applicant had attempted to rehabilitate himself, but found that the combination of offences and the escalation of offences from possession of stolen property over $1000 to possession for the purpose of trafficking of 11 kilograms of cocaine was indicative of a pattern of increasing violence and dangerousness. The Minister found that the Applicant's continued convictions of serious offences demonstrated that he had not rehabilitated himself. Based on the Applicant's proven dangerousness to the public and the Applicant's lack of rehabilitation, the Minister concluded that the Applicant represents a present and future danger to the Canadian public whose presence in Canada poses an unacceptable risk.

[12] The Minister then went on to consider the risk of harm the Applicant would face if removed from Canada. He surveyed the Applicant's submissions that, as a Palestinian refugee in Lebanon, the Applicant would face severe social, political, and civil rights restrictions. The Minister quoted at length from a 2007 Amnesty International report submitted by counsel. The Minister considered

the Applicant's submission that as a result of cumulative discrimination faced by Palestinian refugees, the Applicant would face risk to his physical security and the deprivation faced by the Applicant if removed to Lebanon would shock the conscience of the Canadian public.

[13] The Minister conducted his own research regarding the situation of Palestinian refugees, citing a document from Forced Migration Online, and a UK Border Agency report. The Minister concluded that although the Applicant would face discrimination, it did not rise to the level of persecution. Furthermore, the Minister suggested that if the Applicant's wife and daughter were to move with him as they claimed they would, they would be able to rent and buy property. As such, the Applicant would not necessarily be relegated to living in a refugee camp. The Minister also noted that the Applicant would be able to get a work permit for the area in which he is skilled – home renovation -- and that the Applicant should be able to afford to pay for additional health-care. Based on the totality of the evidence, the Minister concluded that the Applicant would not be exposed to an individualized risk to life, risk of torture or risk of cruel and unusual treatment or punishment, nor would be exposed to more that a mere possibility of persecution if returned to Lebanon.

[14] Since the Applicant was not found to be at risk as described in either sections 96 or 97 of the IRPA, and was found to constitute a danger to the Canadian public, the balance was tipped in favour of the Applicant's removal. The Minister then considered the best interests of the Applicant's child and other H&C considerations. The Minister was satisfied, on a balance of probabilities that, if the Applicant were removed to Lebanon, any hardship to the Applicant or his family did not outweigh the danger the Applicant presented to the public.

II. Issues

[15] The Applicant raises seven issues on this application for judicial review:

(a) Did the Minister breach the Applicant's right to procedural fairness by relying on extrinsic evidence?

(b) Did the Minister err in law by failing to properly take into consideration the Applicant's status as a Convention refugee?

(c) Did the Minister ignore evidence in assessing whether the Applicant constitutes a danger to the public?

(d) Did the Minister apply the incorrect legal test in determining whether the Applicant would be at risk if deported?

(e) Are the Minister's reasons regarding the risk of persecution faced by the Applicant adequate?

(f) Did the Minister err in law by giving weight to irrelevant considerations in assessing whether the Applicant constitutes a danger to the public?

(g) Did the Minister adequately consider the best interests of the child?

III. Standard of Review

[16] The Minister's findings in a danger opinion are a matter of mixed fact and law and are thus accorded a high degree of deference. The Minister's decision is reviewable on the reasonableness standard (*Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 153, [2009] 2 FCR 52 at para 32).

[17] The Applicant alleges that the Minister applied the wrong test to determine if the Applicant would be at risk if deported and that the reasons with regard to risk are inadequate. These are questions of law and are reviewable on the correctness standard (*Nagalingam*, above, at para 34)

IV. Argument and Analysis

A. *Did the Minister Breach the Applicant's Right to Procedural Fairness by Relying on Extrinsic Evidence?*

[18] The Applicant submits that in coming to his conclusion, the Minister heavily relied on a July 2010 National Parole Board (NPB) decision. The Applicant swore in his affidavit that he had no knowledge of this decision until November 2010, after the Minister had rendered his decision. As such, the Applicant takes the position that his right to procedural fairness was breached because the Minister relied on extrinsic evidence that was not disclosed to the Applicant, and he was denied the opportunity to make submissions with respect to its contents.

[19] I must agree with the Respondent that there is no merit to this argument. Contrary to the Applicant's sworn statements, the record shows that the Applicant was sent a copy of the NPB decision on July 21, 2010. The Respondent has pointed the Court to a signed Receipt of Delivery contained in the Certified Tribunal Record (CTR) confirming that the Applicant received a copy of the decision, in person, on July 26, 2010 at the Joyceville Institution, where he was incarcerated at the time (CTR pgs 94 – 98). Accordingly, there was no reliance on extrinsic evidence.

B. *Did the Minister Err in Law by Failing to Properly Take into Consideration the Applicant's Status as a Convention Refugee?*

[20] The Applicant submits that the Minister erred by failing to start his analysis of the risk the Applicant would face upon deportation from the premise that, as an individual who has been recognized as a Convention refugee and continues to hold that status, he would face risk upon deportation. The Applicant argues that in the present case the Minister completely disregarded the Applicant's status as a Convention refugee, and failed to give due weight to the presumption of risk conferred by this status.

[21] The Applicant relies on two recent Supreme Court decisions regarding the extradition of Convention refugees to support this argument: *Gavrila v Canada (Justice)*, 2010 SCC 57, [2010] 3 SCR 342 and *Németh v Canada (Justice)*, 2010 SCC 56, [2010] 3 SCR 281. I understand the Applicant to be making the point, as found in *Németh*, that since the Applicant had been found to be a refugee in accordance with Canadian law, he was therefore the beneficiary of a *prima facie* entitlement to protection from refoulement. In making his decision, the Minister was required to give appropriate weight to this previous determination (see *Németh* at para 106). The Applicant

submits that instead of assuming that the Applicant would be at risk, the Minister instead minimized the Applicant's Convention refugee status.

[22] Reviewing the decision it is clear that that the Minister appreciates the importance of the Applicant's Convention refugee status. As required by the plain wording of subsection 115(2) of the IRPA, the Minister was cognizant that the Applicant could only be returned to Lebanon if he fell into the non-refoulement exception carved out by paragraph 115(2)(a). Paragraph 115(2)(a) follows subsection 115(1) which states Canada's general adherence to the principle of non-refoulement. It is obvious that in using the legislative provisions of the IRPA as the framework for his analysis, the Minister started with the assumption that the Applicant, as a Convention refugee, was at risk of persecution.

[23] The Minister first cited subsection 115(1) before going on to state:

> I note that paragraph 115(2)(a) of IRPA creates an exception to the general protection provided to Convention refugees that they not be returned to the country where they would be at risk of persecution (serious possibility or reasonable chance of persecution). This is the embodiment into Canada's domestic legislation of Article 33(2) of the U.N. Convention relating to the Status of Refugees. Article 33(2) provides that:
>
> > The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitute a danger to the community of that country.

[24] While I respect the Applicant's attempt to analogize the holdings in *Németh* and *Gavrila*, above, to the matter at hand in order to impugn the Minister's decision, paragraph 115(2)(a) of the

IRPA is part of a very particular statutory regime. The structure of section 115 in and of itself requires the Minister to start from the premise that the Applicant is either a Convention refugee or a protected person. Moreover, *Németh* and *Gavrila*, above, arise out of a different factual context – in those cases the Supreme Court allowed the appeals of the Minister's decision to allow the extradition of Convention refugees pursuant to the *Extradition Act*. The Minister erred by imposing too high a threshold for determining whether the appellants would face persecution on their return to their country of origin, and thereby failed to accord the appropriate weight to their status. The danger opinion under the IRPA is quite distinct. The Supreme Court has recognized the IRPA's prioritization of security of Canadians and that the provisions of the IRPA must be read in light of this legislative intent. This objective is given effect by removing applicants with criminal records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada (*Medovarski v Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 539, [2005] SCJ No 31 (QL)).

[25] With respect to a danger opinion, it is only by operation of section 7 of the *Canadian Charter of Rights and Freedoms* that the Minister, providing an opinion under paragraph 115(2)(a) of the IRPA that would allow for the refoulement of a protected person, is required to assess the risk to the person. Obviously, this requires the Minister to be alert and alive to the reason a subject was granted protected status in the first place. However, unlike an application for a determination that refugee protection has ceased under section 108, or an application to vacate refugee status under section 109 of the IRPA, both of which require the Minister to advance reasons in support of the application, subsection 115(2) does not operate to rescind a subject's protected status. Rather, paragraph 115(2)(a) expressly allows for a derogation from the principle of non-refoulement. The

jurisprudence of this Court holds that once the Applicant was found to be a danger to the public, it was up to him to establish that he would be at risk if returned to Lebanon (*Hasan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1069, 339 FTR 21, at paras 19 – 22). The Federal Court of Appeal confirmed in *Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 153, [2009] 2 FCR 52, at para 44, "the Convention refugee or protected person cannot rely on his or her status to trigger the application of section 7 of the Charter." Neither *Németh* nor *Gavrila* can be taken to reverse the onus of showing risk on a danger opinion under subsection 115(2) of the IRPA.

[26] The Applicant also submits that the Minister only speculated as to the circumstances surrounding the Applicant's refugee claim and referred to an unreliable document from the Ministry of the Attorney General in British Columbia. The Applicant argues that this only exacerbates the Minister's failure to properly consider the Applicant's status. Having found no failure on the part of the Minister, I am unable to find any further fault with the Minister's risk analysis under paragraph 115(2)(a). It appears as though the Minister sought information from the IRB regarding the Applicant's family's claim and none was available. Reliance on other documentation was clearly part of the Minister's effort to understand the nature of the initial claim for protection.

C. *Did the Minister Ignore Evidence in Assessing Whether the Applicant Constitutes a Danger to the Public?*

[27] The Applicant submits that the Minister ignored evidence before him that contradicted his finding that the Applicant had not demonstrated rehabilitation. The Applicant contends that the Minister largely came to this conclusion based a 2009 Correctional Service of Canada report noting

that the Applicant had not completed his required programs according to his Correctional Plan. However, the Minister failed to mention a March 2010 NPB assessment which clarified that due to guideline changes after the Applicant's intake, he no longer met the selection criteria for the Violence Prevention Program-Moderate Intensity (VPP), or the Alternatives, Associates and Altitudes Program (AAA).

[28] The Respondent counters that the failure to complete required programming was not the basis for the Minister's conclusion that the Applicant was not rehabilitated. Rather, the reasons evince a consideration of the Applicant's tendency to breach the conditions of his release orders by continuing to engage in unlawful activity. Moreover, the Respondent argues that the Applicant's subsequent ineligibility for the two programs does not contradict the fact that following his completion of two other programs related to an earlier offence, his day parole was revoked as he was found to be in possession of a loaded handgun, and marijuana.

[29] I am not persuaded that the Minister ignored evidence. In any case, I take the Respondent's point that the evidence the Applicant points to – the March 2010 NPB assessment – does not actually contradict the Minister's rehabilitation finding. While the Applicant describes the March 2010 as a clarification, the NPB's July 21, 2010 decision, relied heavily on by the Minister, as per the Applicant's own submission, provides a further clarification of the state of the Applicant's rehabilitation. The NPB wrote:

> According to the intake assessment on your current sentence, you successfully completed programming during your prior federal sentence but your day parole release on that sentence was later revoked. Additionally, as you have again committed offences that involve a violent subculture, the Board puts little weight on past intervention. In this regard, your treatment needs in the area of

> violence prevention remain outstanding as was indicated in a correctional program progress report of March 2010. The Board's focus is not on the change to the Correctional Service of Canada program criteria and that you are no longer recommended for such programming; the Board must consider whether in the absence of a residency condition you will present an undue risk to society by committing a Schedule One offence before your warrant expiry. (CTR pg 96)

[30] This further NPB document shows that, whether the Applicant failed to complete the VPP and AAA programming due to his own decision not to participate or because Correctional Service of Canada (CSC) made fortuitous policy changes following his intake assessment, there was a still a valid basis on which the Minister could reasonably conclude that the Applicant had not demonstrated rehabilitation.

D. *Did the Minister Apply the Incorrect Legal Test in Determining Whether the Applicant Would be at Risk if Deported?*

[31] The Applicant submits that the Minister applied the incorrect test. Section 115 provides that a Convention refugee or a protected person will 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 or unusual treatment or punishment. When reiterating the principle, the Minister instead wrote:

> In reviewing the material to determine if Mr. Alkhalil may face risk upon return to Lebanon, I am required to turn my mind to the factors under section 97 of IRPA. In making an assessment of risk under section 97, it is clear that the risk "would be faced by the person in every part of the country and is not faced generally by other individuals in or from that country". While the issue of whether or not Mr. Alkhalil is removable from Canada is principally guided by the degree of risk he would face as defined in section 97 of IRPA,

> I also take into account the risk of persecution under section 96 of IRPA.

[32] I agree with the Applicant that the Minister employs sloppy wording when setting out the test. This kind of imprecision is best avoided by decision-makers. However, I am unable to see what material effect this had on either the Minister's analysis or ultimate conclusion. The Applicant has not explained to the Court what detrimental impact this loose rewording had on the Applicant beyond asserting that the decision clearly shows that the Minister holds the view that section 96 risks are subordinate to section 97 risks because the Minister concluded that there was insufficient evidence to indicate that the Applicant would be "personally at risk" as a Palestinian refugee in Lebanon.

[33] The Minister clearly evaluated both sets of risks, and used the proper tests in doing so – the "more than a mere possibility" test for persecution under section 96 and the "balance of probabilities test" for harm under section 97. The personally at risk conclusion refers to the Minister's section 97 conclusion. The Minister earlier concluded that the discrimination faced by the Applicant would not amount to persecution under section 96, and later reiterates that he would not be exposed to more than a mere possibility of persecution, another finding that the Applicant challenges.

[34] In all material ways, the Minister applied the correct test. The Applicant has failed to show that the intervention of the Court is warranted.

E. *Are the Minister's Reasons Regarding the Risk of Persecution Faced by the Applicant Adequate?*

[35] The Applicant submits that the Minister failed to consider the cumulative effect of the discrimination faced by Palestinian refugees in Lebanon. The Minister acknowledged that there are many ways in which Palestinian refugees are treated differently than Lebanese citizens. The Minister concluded that such discrimination did not amount to persecution. The Applicant disagrees and seeks to impugn the Minister's decision by way of arguing that his reasons are inadequate to support his conclusion. The Applicant further argues that the Minister's reasons fail to explain why he preferred his own documentary evidence over the reports submitted by the Applicant.

[36] It is obvious that the Applicant will not enjoy the same lifestyle in Lebanon as he would in Canada. From reading the decision it is clear that the Minister has surveyed the country conditions and accepts that the Applicant will suffer discrimination as a Palestinian refugee. The Minister does not ignore or dismiss the submissions of the Applicant. In fact, he quotes the Amnesty International report at length. The Minister does not dispute the facts reported in the Applicant's submissions regarding the conditions under which Palestinian refugees live, and the documentary evidence which he cites in his analysis section does not contradict the conditions described in the reports relied on by the Applicant. The UK Border Agency Report cited by the Minister in his analysis section acknowledges the difficulties face by Palestinian refugees as outlined in the other reports, but also reports on progress that has been made. The Minister adopts the conclusion of the report; that is to say that Palestinian refugees are treated differently than Lebanese citizens, but this

discriminatory treatment, in its admittedly many forms, does not reach the threshold to establish persecution.

[37] The Applicant argues that the Minister's reasons are inadequate. I disagree. The Minister was undoubtedly under an obligation to provide a set of transparent reasons that justify his difficult decision. Any reasonable person reading the decision can understand what the Minister considered, what he concluded, and why.

[38] Aside from relying on documentary evidence suggesting that the level of discrimination does not amount to persecution, the Minister noted that the Applicant's wife, who intends to accompany him should he be removed, would not be subject to the same limitations as the Applicant and should be able to secure rented housing, thus giving the Applicant the option of living outside the refugee camps. The occupations of the Applicant and his wife are in fields that are open to foreigners, so they will not be barred from gainful employment. Health care was acknowledged as an additional expense, but since both the Applicant and his wife have expressed a willingness to work, they should be able to afford health-care in addition to that provided by UNRWA. Thus, the Minister explains that due to the Applicant's particular situation, the discrimination he will face will be minimized and the cumulative impact reduced.

[39] The Minister's decision is thoroughly reasoned. As the Federal Court of Appeal held in *Ragupathy v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151, [2007] 1 FCR 490 at para 15:

> [15] Although trite, it is also important to emphasize that a reviewing court should be realistic in determining if a tribunal's

> reasons meet the legal standard of adequacy. Reasons should be read in their entirety, not parsed closely, clause by clause, for possible errors or omissions; they should be read with a view to understanding, not to puzzling over every possible inconsistency, ambiguity or infelicity of expression.

[40] The Court cannot substitute its judgment for that of the Minister's. Satisfied that the Minister has met the standard of adequacy, the Court will not intervene.

F. *Did the Minister Err in Law by Giving Weight to Irrelevant Considerations in Assessing Whether the Applicant Constitutes a Danger to the Public?*

[41] The Applicant submits that the Minister erred by considering a Vancouver Sun newspaper article and other anecdotal evidence in assessing whether the Applicant had rehabilitated himself. The newspaper article suggested that the Alkhalil family was behind the revenge killing of the man accused of killing the Applicant's brother in 2001. The accused, Michael Naud was found to be acting in self-defence and was acquitted. Mr. Naud's lawyer wrote a letter to the institution where the Applicant was detained to report threats made by the Applicant. The Applicant submits that the Minister's reference to these events is in error because the Applicant was never charged in connection with these events, and, as a result any suggestion that the Applicant was involved is mere speculation.

[42] Again, I am not convinced that the Minister erred. If the speculation relating to the intimidation and killing of Mr. Naud were the only evidence relied on by the Minister to find that the Applicant was not rehabilitated, it might be arguable that the Minister's finding was

unreasonable. However, the newspaper article and anecdotal evidence were only supplementary to other evidence suggesting recidivism on the part of the Applicant.

[43] The Minister referred to a CSC report explaining that, notwithstanding the Applicant's successful completion of programming during his incarceration in 2002, his day parole was later revoked when he was found in possession of a loaded handgun and marijuana and to have been making threats of violence in retribution for the acquittal of Mr. Naud. In 2006, the Applicant was released on bail, but was later found to be in beach of his recognizance. He was charged with possession of ecstasy, a firearm offence and a driving offence. These charges appear to have been stayed.

[44] Counter to the Applicant's submission, the Federal Court of Appeal has confirmed that the Minister can consider the underlying circumstances of withdrawn or dismissed charges at an immigration hearing, but cannot rely on such charges, in and of themselves, as evidence of an individual's criminality (*Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, [2007] 3 FCR 198 at paras 50, 51; see *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2007 FC 687, 62 Imm LR (3d) 271 paras 34 – 38). Justice Anne Mactavish made the distinction between the utility of the fact of an outstanding charge alone, and the evidence underlying a charge in *Thuraisingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 607, 251 FTR 282 at para 35:

> [35] La, Bakchiev, Bertold and Dokmajian each relate to situations where the Minister's delegate relied on the existence of outstanding charges to support a danger opinion. In each case, this was found to be a reversible error. In my view, a distinction must be drawn between reliance on the fact that someone has been charged with a criminal offense, and reliance on the evidence that underlies

> the charges in question. The fact that someone has been charged with an offense proves nothing: it is simply an allegation. In contrast, the evidence underlying the charge may indeed be sufficient to provide the foundation for a good-faith opinion that an individual poses a present or future danger to others in Canada.

[45] Moreover, the Minister is not bound by the evidentiary rules of a criminal court, and is entitled to rely on evidence which is relevant, credible and reliable (*Krishnan v Canada (Minister of Citizenship and Immigration)*, 2007 FC 846, 63 Imm LR (3d) 38 para 15). In any case, this is not a case where the Minister seeks to support his danger opinion with outstanding criminal charges. Given the totality of the evidence, I am not convinced that the Minister's consideration of events described in the newspaper article for which the Applicant was not charged amounts to a reviewable error. The newspaper article did not receive undue weight. The conclusion that the Applicant failed to show that he had rehabilitated himself was reasonably open to the Minister based on the Applicant's criminal history, the most recent conviction occurring after the Applicant moved across the country to start life afresh.

G. *Did the Minister Adequately Consider the Best Interests of the Child?*

[46] The Applicant submits that the Minister failed to give serious weight to the best interests of the child and does not provide an adequate analysis into the hardship the child would suffer if the Applicant were deported.

[47] The Applicant has a five year old Canadian born daughter. During the Applicant's incarceration she lived with her mother (the Applicant's wife), who lives with the Applicant's relatives. The Minister noted that the Applicant was arrested for drug and dangerous driving

offences shortly before her birth in 2005. He was released on bail before she was born, but breached his bail conditions and has been incarcerated since July 30, 2006. Consequently, the Applicant has spent not quite 12 months with his daughter. The Minister noted that the Applicant was not deterred from engaging in criminal activity by knowing it would result in time away from his daughter and that the child does not really know her father. The Minister acknowledged that the Applicant's removal from Canada would cause the family distress; however, considering that the mother and child have decided to accompany the Applicant if he is removed, the Minister concluded that the child would not suffer unduly.

[48] The Applicant submits that time spent with the child is an irrelevant consideration as to what is in the child's best interests and that the Minister's analysis is improper. In the Applicant's opinion, the Minister ought to have considered that the Applicant will face discrimination in Lebanon and will not be able to provide for the child the way he would be able to if he remains in Canada.

[49] The Minister specifically turned his mind to the best interests of the Applicant's daughter and considered the Applicant's submissions on the issue. The Minister found that the H&C considerations did not outweigh the danger the Applicant poses to the Canadian public. The Court is not to re-weigh the factors considered by the Minister, but to ensure that relevant factors were not ignored. Such would constitute a reviewable error. I agree with the Respondent that in this case there is no reviewable error. The Minister considered the issues and concluded that since the child would accompany her mother and father to Lebanon, she would not suffer unduly. The Applicant disagrees with the result, but cannot mandate how the analysis ought to be done. Although the

Minister did not explicitly mention that the Applicant would be less able to provide for his daughter in Lebanon, the Minister had previously acknowledged that the Applicant's freedoms would be somewhat more limited in Lebanon than in Canada. Nonetheless, the Applicant would still have much freedom, and as Canadian citizens his wife and daughter will not face the same discrimination that he may face in Lebanon.

[50] The best interests of the child are one consideration, but it is not alone determinative of the case. After recently summarizing the case law on best interests of the children in *Khoja v Canada (Minister of Citizenship and Immigration)*, 2010 FC 142, Justice Michel Shore reminded the Court at para 43:

> [43] The cases of *Hawthorne* and *Legault*, above, state that an applicant is not entitled to a positive decision even if the best interests of the child would favour such an outcome. In the majority of circumstances, the best interests of the child would favour residing in Canada with his or her parents, but this is only one factor to be weighed by the H&C officer in reaching a decision.

[51] The best interests of the child cannot trump the rest of the Minister's assessment. In any case, I am satisfied that the Minister's conclusion is within the range of acceptable outcomes, and it is not the place of this Court to intervene.

V. Conclusion

[52] In consideration of the above conclusions, this application for judicial review is dismissed.

[53] The Applicant has requested that I certify a question in the event I dismiss the application for judicial review. It is clear that the question would be similar to the second question proposed for certification in *Hasan*, above:

> 2. For the purpose of the balancing exercise in s. 115(2), where the individual concerned is a Convention refugee, does the onus rest on the individual to show that the risk which led to the refugee determination continues or does the finding that a person is a Convention refugee create a rebuttable presumption that the person is at risk on return?

The Applicant would add to this whether:

> The ruling in *Németh*, above, changes the prior law with respect to this issue.

[54] In my view, for the reasons above, it is clear that *Németh*, above, has not affected the jurisprudence with respect to operation of paragraph 115(2)(a) and the exception it creates to the principle of non-refoulement set out in subsection 115(2). As such, I share the view of Justice Judith Snider in *Hasan*, above, with respect to a similar question that there is no need to certify a question that has been settled by the jurisprudence.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
DATED:	**AUGUST 4, 2011**

APPEARANCES:

Lorne Waldman	FOR THE APPLICANT
Ian Hicks	FOR THE RESPONDENT

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