Federal Court  Cour fédérale

Date: 20111214

Docket: IMM-4510-11

Citation: 2011 FC 1473

BETWEEN:

SHARMARKE MOHAMED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] Mr. Mohamed, a permanent resident of Canada, has amassed a number of convictions for serious crimes. If he had come from, say, Sweden, he would not only have been found inadmissible pursuant to section 36 of the *Immigration and Refugee Protection Act* for serious criminality, but in all likelihood would have been deported long ago. However, he is a refugee from Somalia and is protected under section 115(1) of IRPA in that Canada, as a signatory to the *United Nations Convention Relating to the Status of Refugees*, recognizes the principle of "non-refoulement". We will not return persons to their country of origin if 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] However, there is an exception. Section 115(2) of IRPA provides:

(2) Subsection (1) does not apply in the case of a person	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
(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	a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
(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.	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] The Minister's delegate carried out a danger opinion. She was of the view that Mr. Mohamed constituted a danger to the public in Canada, and that such danger outweighed the risk of danger to him should he be returned to Somalia. This is the judicial review of that decision.

DANGER OPINION – APPLICABLE LEGAL PRINCIPLES

[4] The legal principles applicable to a case such as this were summarized by the Federal Court of Appeal in *Ragupathy v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151, [2006] FCJ No 654 (QL).

[5] The first step is to determine whether Mr. Mohamed is inadmissible on grounds of serious criminality. On this point there can be no doubt.

[6] The second step is to decide whether, in the opinion of the Minister, Mr. Mohamed constitutes a danger to the Canadian public. More shall be said on the reasonableness of that determination.

[7] If the Minister's delegate is of the opinion that a person is a danger to the public, then there must be an assessment as to the risk to which that person would be subjected if removed, and that risk must be balanced against the danger to the public should the person be let loose here. This balancing takes into account humanitarian and compassionate circumstances.

[8] Although the Minister's delegate must assess the danger to the person under sections 96 and 97 of IRPA, those sections only come into play indirectly (*Jama v Canada (Minister of Citizenship and Immigration)*, 2009 FC 781, 350 FTR 61; *Alkhalil v Canada (Minister of Citizenship and Immigration)*, 2011 FC 976, [2011] FCJ No 1198). The key sections which require balancing are sections 7 and 12 of the *Canadian Charter of Rights and Freedoms* which provide:

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.
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.	**12.** Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

See *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002]1 SCR 3.

WAS THE DECISION THAT MR. MOHAMED CONSTITUTES A DANGER TO THE PUBLIC REASONABLE?

[9] The Minister's delegate's analysis is not a pure analysis of law and, therefore, is entitled to deference; to a review on the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

[10] Mr. Mohamed entered Canada in 1990 and was determined to be a Convention refugee. He became a permanent resident the following year.

[11] He has been convicted of various crimes, with greater violence being evident. He was convicted of assault with a weapon and convicted on three counts of robbery. His anger management issues have been fuelled by drugs and alcohol.

[12] More recently, he completed a National Substance Abuse Moderate Intensity Program, a rehabilitation program which was offered to him while in custody. It is suggested that he is now able to recognize the link between his substance abuse and his involvement in criminal activity.

[13] What I find somewhat disturbing is that he was about to be let out of prison on parole. However, a halfway house was not available, and the authorities decided not to let him loose without supervision and control. It might have been reasonable to conclude that he did not constitute

a danger. However, the Minister's delegate interpreted these facts as suggesting that without supervision and control he is a danger. Although I may well have come to a different conclusion had I been the decision maker in first instance, I have to concede that the decision was not unreasonable. As Mr. Justice Iacobucci said in *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, 209 NR 20, at paragraph 80:

> I wish to observe, by way of concluding my discussion of this issue, that a reviewer, and even one who has embarked upon review on a standard of reasonableness *simpliciter*, will often be tempted to find some way to intervene when the reviewer him- or herself would have come to a conclusion opposite to the tribunal's. Appellate courts must resist such temptations. My statement that I might not have come to the same conclusion as the Tribunal should not be taken as an invitation to appellate courts to intervene in cases such as this one but rather as a caution against such intervention and a call for restraint. Judicial restraint is needed if a cohesive, rational, and, I believe, sensible system of judicial review is to be fashioned.

DANGER ON RETURN TO SOMALIA

[14] The Minister's delegate went into some length to describe Somalia as a lawless state, one of the most dangerous places on earth. She acknowledged a UNHCR plea that no one be sent back to Somalia. However, under both the Convention and section 115(2) of IRPA, we are not obliged to keep someone here who is a danger to the public.

[15] Mr. Mohamed's original refugee claim was based on political opinion. He opposed the Siad Barre regime which has now been overthrown. Nor is he at personal risk of torture or cruel and unusual treatment or punishment. There is a risk to his life. He is at risk of losing his life in an act of random violence. However, according to the Minister's delegate, that is a generalized risk under section 97 of IRPA, a risk faced by everyone, in one form or another, everywhere in Somalia.

[16] Mr. Mohamed's counsel raised every point which could possibly be raised to support the proposition that his risk was personal. He would be returning as an educated westerner who would be out of place as he left more than 20 years ago. However, in her decision the Minister's delegate pointed out that large numbers of Somalis go about their daily business under risks which are less than the balance of probabilities, the burden required under section 97 of IRPA (*Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] 3 FCR 239).

[17] If the decision in first instance had been mine to make, I might have come to a different conclusion by giving more weight to reports from the United Nations, and less to the latest United Kingdom Report. However, in so doing, I would be merely weighing the evidence in a manner different from that of the Minister's delegate. As per *Dunsmuir* and *Southam*, judicial restraint must be exercised, and so I cannot say that the danger opinion is unreasonable.

HUMANITARIAN AND COMPASSIONATE CONSIDERATIONS

[18] The Minister's delegate took account of the fact that Mr. Mohamed is estranged from his first wife and two children. Indeed, there are court orders against him. While he is separated from his second wife, she has supported him. The Minister's delegate also took into account the best interest of his child with his second wife. His relatives are either in Canada or in the United States, but one cannot say they are particularly close. Again the analysis was not unreasonable.

SERIOUS QUESTION OF GENERAL IMPORTANCE FOR CERTIFICATION

[19] As discussed at the hearing, counsel for the unsuccessful party, in this case Mr. Mohamed, shall have a reasonable opportunity to submit a serious question of general importance which would support an appeal. Given the Christmas recess, Mr. Mohamed shall have until Monday, 9 January 2012 to submit such a question or to inform the Registry to the contrary. If a question is submitted, counsel for the Minister shall have until Monday, 16 January 2012, to reply.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4510-11
STYLE OF CAUSE:	MOHAMED v MCI
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	DECEMBER 7, 2011
REASONS FOR ORDER:	HARRINGTON J.
DATED:	DECEMBER 14, 2011

APPEARANCES:

Jennifer L. Godwin Peter Edelman	FOR THE APPLICANT
Caroline Christiaens	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Edelman & Co. Law Offices Barristers & Solicitors Vancouver, British Columbia	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT