Federal Court  Cour fédérale

Date: 20130417

Docket: IMM-4556-12

Citation: 2013 FC 393

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, April 17, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

NAFEZ LAISSI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The applicant is a French citizen and temporary resident of Canada. He is seeking judicial review of a deportation order made against him dated May 8, 2012, by an officer of the Canada Border Services Agency (CBSA), namely, the Minister's Delegate (decision-maker), for having failed to comply with his requirement, as a temporary resident, to leave Canada at the end of the

period authorized for his stay, under subsection 29(2) and section 41 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] Section 29 of the IRPA sets out the rights and obligations of temporary residents with respect the period authorized for their stay in Canada:

29. (1) A temporary resident is, subject to the other provisions of this Act, authorized to enter and remain in Canada on a temporary basis as a visitor or as a holder of a temporary resident permit.	**29.** (1) Le résident temporaire a, sous réserve des autres dispositions de la présente loi, l'autorisation d'entrer au Canada et d'y séjourner à titre temporaire comme visiteur ou titulaire d'un permis de séjour temporaire.
(2) A temporary resident must comply with any conditions imposed under the regulations and with any requirements under this Act, must leave Canada by the end of the period authorized for their stay and may re-enter Canada only if their authorization provides for re-entry.	(2) Le résident temporaire est assujetti aux conditions imposées par les règlements et doit se conformer à la présente loi et avoir quitté le pays à la fin de la période de séjour autorisée. Il ne peut y rentrer que si l'autorisation le prévoit.

II. Facts

[3] The applicant, Nafez Laissi, arrived in Canada on November 28, 2010, as a visitor. He had a visitor's visa that was valid until June 28, 2011.

[4] On June 24, 2011, the applicant was arrested by the Service de la police de la Ville de Montréal (Montreal Police) and charged with domestic violence. He was detained from June 24 to June 28, 2011, when he was released by the Court of Quebec, after having promised to meet certain

conditions, which included remaining in Montréal, obeying a curfew, and surrendering his passport to the Registry of the Court of Quebec within 24 hours of his release. He was to appear before the Court of Quebec on October 5, 2012.

[5] On May 8, 2012, an inadmissibility report was written against the applicant pursuant to subsection 44(1) of the IRPA on the basis that he was inadmissible to Canada for having breached his obligations under the IRPA by refusing to leave Canada at the end of the authorized period of stay. On the same date, the decision-maker issued a deportation order against the applicant, under subsection 44(2) of the IRPA and subparagraph 228(1)(*c*)(iv) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR], without referring the matter to the Immigration Division, hence the present application for judicial review.

[6] Subparagraph 228(1)(*c*)(iv) of the IRPR reads as follows:

228. (1) For the purposes of subsection 44(2) of the Act, and subject to subsections (3) and (4), if a report in respect of a foreign national does not include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be	**228.** (1) Pour l'application du paragraphe 44(2) de la Loi, mais sous réserve des paragraphes (3) et (4), dans le cas où elle ne comporte pas de motif d'interdiction de territoire autre que ceux prévus dans l'une des circonstances ci-après, l'affaire n'est pas déférée à la Section de l'immigration et la mesure de renvoi à prendre est celle indiquée en regard du motif en cause :
…	[…]
(*c*) if the foreign national is inadmissible under section 41 of the Act on grounds of	*c*) en cas d'interdiction de territoire de l'étranger au titre de l'article 41 de la Loi pour manquement à :

…	[…]
(iv) failing to leave Canada by the end of the period authorized for their stay as required by subsection 29(2) of the Act, an exclusion order, …	(iv) l'obligation prévue au paragraphe 29(2) de la Loi de quitter le Canada à la fin de la période de séjour autorisée, l'exclusion, […]

III. Issue and standard of review

[7] Did the decision-maker err by issuing an exclusion order against the applicant without considering all of the evidence in the record?

IV. Standard of review

[8] It is not disputed that the decision in question was made in the exercise of a discretionary power by the decision-maker under subsection 44(2) of the IRPA, and must be subject to the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9). As Justice John O'Keefe noted recently in *Finta v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1127:

> [30] ... Once an inadmissibility report has been prepared and found to be well founded, the Minister has the discretion to refer the report to the Immigration Division. However, the Act and Regulations specify certain circumstances when the Minister may issue a removal order. A Minister's decision to refer the report to the Immigration Division as opposed to issuing a removal order is essentially a determination of the scope of its discretion. This is a question of law reviewable on the correctness standard (see *Faci v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 693, [2011] FCJ No 893, at paragraph 21). Similarly, it is well established that the appropriate standard of review for issues of procedural fairness is correctness (see *Wang v Canada (Citizenship and Immigration)*, 2008 FC 798, [2008] FCJ No 995, at paragraph 13; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at paragraph 43). No deference is owed to decision makers on these issues (see *Dunsmuir* above, at paragraph 50).

> [31] If the Minister correctly decides that a removal order rather than referral to the Immigration Division is warranted, "the Minister may make a removal order" (subsection 44(2) of the Act). This determination involves questions of mixed fact and law that are reviewable on a reasonableness standard. In reviewing the delegate's decision on the standard of reasonableness, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; *Khosa* above, at paragraph 59). It is not up to a reviewing Court to substitute its own view of a preferable outcome, nor is it the function of the reviewing Court to reweigh the evidence (see *Khosa* above, at paragraphs 59 and 61).

[9] When applying the reasonableness standard, the Court must only intervene if the decision-maker reached a conclusion that is not justifiable, transparent and intelligible, or that does not fall within the range of possible, acceptable outcomes, having regard to the whole of the evidence in the record (*Dunsmuir*, above, at paragraph 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59). It is not open to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (*Khosa* at paragraphs 59-61).

V. Positions of the parties

[10] The applicant submits that the decision-maker ought to have taken all of the relevant facts into consideration prior to issuing the deportation order against him, namely, the fact that the applicant had a criminal case pending for which he was to required to appear before the Court of Québec on October 5, 2012, the fact that the applicant was in detention until the day his visitor's record expired, namely, on June 28, 2011, and the fact that he was released on condition that he remain in Montréal, obey a curfew and surrender his passport to the Registry of the Court of Quebec within 24 hours of his release.

[11] The applicant claims that under the circumstances, he was unable to leave Canada when the authorized period of stay expired, not by choice, but because he was obliged to comply with the conditions that were imposed on him during his criminal trial. It is, according to him, [TRANSLATION] "a classic case where the left hand of the Canadian state does not know what the right hand is doing". Consequently, the failure on the part of the decision-maker to take the particular circumstances of the applicant into consideration in the exercise of his discretion renders the decision unreasonable.

[12] The applicant adds that the impugned deportation order has very serious consequences for him. In fact, under section 225 of the IRPR, it means that the applicant cannot return to Canada for a period of one year after his departure, unless he obtains written consent from the Minister.

[13] In support of his position, the applicant cites, in particular, subsection 234 of the IRPR, which reads as follows:

234. For greater certainty and for the purposes of paragraph 50(*a*) of the Act, a decision made in a judicial proceeding would not be directly contravened by the enforcement of a removal order if	**234.** Il est entendu que, pour l'application de l'alinéa 50a) de la Loi, une décision judiciaire n'a pas pour effet direct d'empêcher l'exécution de la mesure de renvoi s'il existe un accord entre le procureur général du Canada ou d'une province et le ministère prévoyant :
(*a*) there is an agreement between the Department and the Attorney General of Canada or the attorney general of a province that criminal charges will be withdrawn or stayed on the	*a*) soit le retrait ou la suspension des accusations au pénal contre l'étranger au moment du renvoi;

removal of the person from Canada; or	
(*b*) there is an agreement between the Department and the Attorney General of Canada or the attorney general of a province to withdraw or cancel any summons or subpoena on the removal of the person from Canada.	*b*) soit le retrait de toute assignation à comparaître ou sommation à l'égard de l'étranger au moment de son renvoi.
	[La Cour souligne].

[Emphasis added.]

[14] The respondent submits that the reasons that compel a temporary resident to extend his or her stay in Canada beyond the authorized period are irrelevant for the purposes of subsection 44(2) of the IRPA. When a CBSA officer writes an inadmissibility report for any violation of the terms of the IRPA, the decision-maker is exercising a "Ministerial" duty or a "non-discretionary power" that carries very limited power of assessment with it, and that has been characterized in doctrine as "a duty, the discharge of which involves no element of discretion or independent judgment" (*Laluna v Canada (Minister of Citizenship and Immigration*) (2000), 182 FTR 134, [2000] FCJ No 271 (QL/Lexis) at paragraph 16). The respondent claims that the issuing of an exclusion order under subparagraph 228(1)(*c*)(iv) of the IRPR constitutes an obligation for the decision-maker and not a choice, thus rendering the impugned decision unassailable on a reasonableness standard.

[15] The respondent relies in particular on *Lasin v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1356 at paragraph 15, and on *Rosenberry v Canada (Minister of Citizenship and Immigration)*, 2010 FC 882, 374 FTR 116, to support the argument that the Minister's Delegate is in no way obliged to consider such mitigating factors as being in a conjugal relationship with a

Canadian citizen or having a pending application for permanent residence when issuing an exclusion order under section 228 of the IRPR.

VI. Analysis

[16] The parties made no reference to any case that directly addresses the issue as to whether the failure of the decision-maker to consider the applicant's particular circumstances, which could potentially justify his non-compliance with his authorized period of stay under subsection 29(2) of the IRPA, could affect the reasonableness of the decision.

[17] There is no basis for the Court to conclude that the decision-maker disregarded the facts alleged by the applicant. The applicant makes no claim that the respondent breached any principle of procedural fairness prior to issuing the removal order when, for example, it did not refer the applicant's case to the Immigration Division for an admissibility hearing, which was within the respondent's power to do under subsection 44(2) of the IRPA. Rather, the issue before the Court is to determine whether the decision-maker had an obligation to accept the applicant's mitigating circumstances, inform him of this fact, and possibly rule in his favour. Failing that, it is still possible to argue that the decision-maker allegedly ignored facts that were favourable to the person against whom the removal order was issued.

[18] Although *Lasin* and *Rosenberry*, cited by the respondent, essentially deal with institutional independence and the procedural fairness obligations incumbent on the Minister's Delegate, acting under subsection 44(2) of the IRPA, toward a temporary resident against whom a removal order has been issued for failing to respect the authorized period of stay, the Court finds the following

comments made by Justice O'Keefe in *Rosenberry*, above, to be particularly instructive for this matter:

> [36] ... Under section 44, immigration officials are simply involved in fact-finding. They are under an obligation to act on facts indicating inadmissibility. It is not the function of such officers to consider H&C factors that would be considered in a pre-removal risk assessment. This was recently confirmed in *Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 F.C.R. 409, at paragraphs 35 and 37. [Emphasis added.]

[19] Similarly, in *Lasin*, above, Justice Pierre Blais suggests that the fact that a Minister's Delegate fails to consider factors relating to an application for permanent residence filed by the applicant, when deciding whether to issue an exclusion order under subsection 29(2) of the IRPA, cannot render his or her decision unreasonable:

> [19] The immigration officer had only to conclude, based on the facts that the applicant did not have the proper status in order to remain in Canada. The standard of review for this type of administrative fact finding decision is that of patently unreasonable. I am convinced that the immigration officer followed the process set out in the Act and made a reasonable determination.
>
> [Emphasis added.]

[20] In light of this case law and the evidence adduced, the Court is not willing to conclude that the decision does not fall within a "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at paragraph 47), nor has it been demonstrated that it was made without regard to the relevant facts in the record. The Court adds, with respect, that the applicant relied on section 234 of the IRPR, without specifying whether, in fact, an agreement within the meaning of this provision and applicable to the facts in this case, had been reached between the Department and the province of Quebec.

VII. Conclusion

[21] Consequently, the Court dismisses the applicant's application for judicial review.

[22] The Minister of Citizenship and Immigration has requested that the respondent, who is responsible for carrying out deportation orders, be substituted for him for the purposes of this application for judicial review in accordance with the *Department of Public Safety and Emergency Preparedness Act*, SC 2005, c 10, and the Order dated April 4 2005, PC 2005-0482, and the Court so orders.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The present application for judicial review be dismissed;
2. No question of general importance will be certified;
3. The style of cause be amended in such a way that the Minister of Public Safety and Emergency Preparedness replaces the Minister of Citizenship and Immigration as respondent in this proceeding, as it appears in the style of cause above.

"Michel M.J. Shore"

Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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