Federal Court  Cour fédérale

Date: 20180608

Docket: IMM-4786-17

Citation: 2018 FC 588

Ottawa, Ontario, June 8, 2018

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

MAKADOR ALI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Makador Ali is a Somali citizen who came to Canada as a refugee when he was eight years old. Starting in his teen years, Mr. Ali became involved in criminal activity, and he has amassed a significant criminal history since 2004. His criminal record includes convictions for causing a disturbance, theft under $5000, resisting arrest, mischief and obstructing a peace officer. He was also convicted of multiple counts of assault, possession of marijuana and failure to comply with the conditions of undertakings.

[2] In 2015, a Minister's Delegate issued a danger opinion, finding that Mr. Ali was a danger to the public in Canada. The Minister's Delegate further found that the danger that Mr. Ali posed to Canadians was not outweighed by the risks that he faced in Somalia, or by humanitarian and compassionate factors. The event which triggered the preparation of the danger opinion appears to have been Mr. Ali's involvement, along with members of the "Bloods" gang, in a home invasion lasting some 34 days.

[3] In 2017, Mr. Ali asked that the Minister's Delegate reconsider the 2015 danger opinion. This request was rejected by the Minister's Delegate, and this refusal is the decision under review in the current application.

[4] After commencing his application for judicial review, Mr. Ali's request for a stay of his removal was dismissed by this Court: *Ali v. Canada (Minister of Citizenship and Immigration)*, 2018 FC 76. He has since been deported to Somalia.

[5] Mr. Ali asserts that the reconsideration decision was arrived at in a procedurally unfair manner, and that the Minister's Delegate erred in law in determining that the Supreme Court's decision in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909 did not apply in the context of danger opinions. He further submits that the Minister's Delegate's treatment of the new evidence that he had adduced in support of his request for reconsideration rendered the decision unreasonable.

[6] For the reasons that follow, I am not persuaded that the Minister's Delegate erred as alleged. Consequently, Mr. Ali's application for judicial review will be dismissed.

I. Mr. Ali's Procedural Fairness Arguments

[7] To the extent that Mr. Ali's application raises questions of procedural fairness, the Court's task is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances, in other words, to apply the correctness standard: see *Mission Institution v. Khela*, 2014 SCC 24 at para. 79, [2014] 1 S.C.R. 502; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at para. 34, [2018] F.C.J. No. 382.

A. *The Test used by the Minister's Delegate in Assessing Mr. Ali's New Evidence*

[8] Mr. Ali submits that in refusing his reconsideration request, the Minister's Delegate relied upon criteria dealing with the admissibility of new evidence that were contained in a policy manual that did not come into force until November 21, 2017 (see s. 7.16 of IRCC's Policy Manual ENF 28: "Ministerial opinions on danger to the public, nature and severity of the acts committed and danger to the security of Canada"). This was a month *after* the decision was made refusing to reconsider the 2015 danger opinion.

[9] Mr. Ali says that this was unfair, as the revised policy manual created a more exacting standard for the admission of new evidence than the criteria contained in the earlier policy manual, which required only that the decision-maker consider "facts or evidence that were not available at the time of the original decision".

[10] In contrast, Mr. Ali submits that the new policy manual uses more specific language, stipulating that consideration should be given to whether the evidence was reliable, relevant or material, and whether it was "new" in the sense that it related to the current state of affairs in the individual's country of origin, whether it proved a fact that was unknown at the time of the

original decision, and whether it contradicted a finding of fact made by the original decision-maker.

[11] Mr. Ali contends that he could not have anticipated that the Minister's Delegate would rely on the test contained in the revised policy manual in assessing his new evidence, rather than that articulated in the policy manual in effect at the time of his application for reconsideration. Consequently, Mr. Ali says that he was treated unfairly, as he had no opportunity to address the revised test in his submissions.

[12] There is no reference to the revised policy manual in the Minister's Delegate's 2017 decision, and I agree with the Minister that there is no evidence in the record that demonstrates that the Minister's Delegate relied on the new version of the policy manual in arriving at that decision.

[13] What the Minister's Delegate did rely on in assessing the "new evidence" was the jurisprudence that has developed with respect to when material provided in support of an immigration-related application will be admitted as "new evidence".

[14] As noted by the Minister's Delegate, to be admissible as 'new evidence', "the jurisprudence stipulates that the evidence must be credible, relevant, material and new in the sense of being able to prove a change in country conditions, prove a fact that was not known at the time of the original decision or contradict a finding in the original decision". These are essentially the criteria established by the Federal Court of Appeal in *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 370 N.R. 344.

[15] The fact that *Raza* did not involve a danger opinion does not, in my view, mean that the test identified there had no relevance to Mr. Ali's application, or that it was unfair for the Minister's Delegate to have had regard to the *Raza* criteria in assessing whether or not to consider the evidence provided by Mr. Ali in support of his reconsideration request. As the Federal Court of Appeal observed in *Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 96 at para 43, [2016] 4 F.C.R. 230, "the criteria used in *Raza* are consistent with the tests generally adopted by courts and administrative bodies, and are essentially designed to preserve the integrity of the judicial process".

[16] Mr. Ali should thus have been able to anticipate that the Minister's Delegate would have regard to the governing jurisprudence for guidance in evaluating the evidence that he submitted in support of his reconsideration request, and no procedural unfairness has been demonstrated in this regard.

B. *The Minister's Delegate's Reliance on Charges that were Subsequently Withdrawn*

[17] Mr. Ali submits that there was an additional breach of procedural fairness in this case, as the Minister's Delegate had regard to a charge of attempted murder that had been laid against him in 2013 in arriving at the conclusion in the 2015 danger opinion that Mr. Ali presented a danger to the public in Canada. In his request for reconsideration of the 2015 decision, Mr. Ali advised the Minister's Delegate that the attempted murder charge had in fact been withdrawn in March of 2016, submitting that the danger opinion should be reconsidered as a result.

[18] As I observed in *Thuraisingam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 607 at para. 35, 251 F.T.R. 282, while the evidence underlying a criminal charge may indeed be sufficient to provide the foundation for a good-faith opinion that an individual poses a

present or future danger to the public in Canada, the mere fact that someone has been charged with an offense proves nothing: it is simply an allegation.

[19] It is, however, clear from the 2015 danger opinion that the Minister's Delegate was alive to the difference between criminal charges and criminal convictions, as he or she expressly stated that "in accordance with the presumption-of-innocence principle, I shall not take into consideration the fact that the applicant is currently facing a charge of attempted murder".

[20] The Minister's Delegate did, however, go on to consider the fact that Mr. Ali was in contact with the police in relation to the attempted murder, as part of some 75 interactions between Mr. Ali and the police over time. In the view of the Minister's Delegate, these interactions attested to Mr. Ali's lifestyle as part of a criminal street gang.

[21] I agree with Mr. Ali that looking at the frequency of an individual's contact with the police as evidence of criminality is potentially problematic: *Balan v. Canada (Public Safety and Emergency Preparedness)*, 2015 FC 691 at para. 21, 482 F.T.R. 49. It is, moreover, generally accepted that racialized communities are more intensely policed than their white counterparts: *Nassiah v. Peel (Regional Municipality) Services Board*, 2007 HRTO 14 at para. 126, 61 C.H.R.R. D/88; see also the discussion of racial profiling in *R. v. Brown*, 170 O.A.C. 131 at paras. 7-9, 105 C.R.R. (2d) 132 (Ont. C.A.). Consequently, it could be unfair for decision-makers to draw conclusions about a racialized individual's "lifestyle" based on the number of interactions that they have had with the police.

[22] That said, it must be kept in mind that this application for judicial review does not relate to the 2015 danger opinion, and that the decision under review is the Minister's Delegate's 2017 decision not to reconsider the 2015 decision.

[23] If Mr. Ali had concerns about the Minister's Delegate's reliance on the frequency of his interactions with the police as evidence of his general criminality and his involvement with a street gang, those concerns should have been addressed by way of judicial review of the 2015 decision, and not by mounting a collateral attack on that decision through this proceeding.

[24] In considering Mr. Ali's argument that the 2015 danger opinion should be reconsidered because the charge of attempted murder against him had subsequently been withdrawn, the Minister's Delegate noted that the attempted murder charge was only relied upon in the 2015 danger opinion as one of many interactions between Mr. Ali and the police. The Minister's Delegate further noted that he or she had made it clear in the 2015 decision that in accordance with the presumption of innocence, the pending attempted murder change was *not* being relied upon as evidence that Mr. Ali had in fact committed the offence.

[25] It is, moreover, clear that the 2015 decision was not based solely on Mr. Ali's interactions with the police, and that the Minister's Delegate relied heavily on Mr. Ali's significant criminal record and the facts of the home invasion for which he was convicted of criminal offences.

[26] Mr. Ali has thus failed to demonstrate how he was treated in a procedurally unfair manner in the way that the Minister's Delegate dealt with this issue.

II. The *Kanthasamy* Argument

[27] In formulating a danger opinion, a Minister's Delegate must assess the nature and severity of the acts committed by an individual in determining whether that individual poses a danger to the public in Canada, as well as the risk of harm faced by the individual in his or her country of origin. The Minister's Delegate must then balance the nature and severity of the acts committed by the individual or the danger posed to the security of Canada against the degree of risk, and must also take any other humanitarian and compassionate considerations that have been identified by the individual into account: *Nagalingam v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 153 at para. 44, [2009] 2 F.C.R. 52.

[28] Mr. Ali argued in 2015 that humanitarian and compassionate considerations outweighed the risk that he presented to the public in Canada. The factors identified by Mr. Ali included his family ties in Canada and his corresponding lack of family ties in Somalia, as well as his establishment in Canada, his lack of familiarity with Somalia, and the difficult conditions in that country.

[29] The Minister's Delegate considered each of these factors in the 2015 danger opinion, accepting that Mr. Ali's return to Somalia would present him with a "significant challenge", and that the severing of family ties would also cause problems for both Mr. Ali and the members of his family. At the same time, the Minister's Delegate found that the presence of one of Mr. Ali's brothers in Somalia would "facilitate his adjustment" into Somali society.

[30] The Minister's Delegate further concluded that because of his criminal past, Mr. Ali had not developed significant ties to the working world in Canada, and that his degree of establishment in this country was low.

[31] While recognizing that some positive humanitarian and compassionate factors had been identified by Mr. Ali, the Minister's Delegate concluded that these factors did not counterbalance "the significant inadmissibilities weighing on [Mr. Ali's] shoulders". The Minister's Delegate thus concluded that there were insufficient humanitarian and compassionate considerations to conclude that Mr. Ali's return to Somalia would cause him unusual and undeserved or disproportionate hardship.

[32] The decision in the 2015 danger opinion was released several days before the Supreme Court rendered its decision in *Kanthasamy*, above. There, the Supreme Court was critical of the use of the words "unusual and undeserved or disproportionate hardship" in an H&C analysis, as if they were mandatory requirements that limited the equitable humanitarian and compassionate discretion conferred on immigration officers under subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. According to *Kanthasamy*, these terms were descriptive, and did not create new thresholds for relief separate and apart from the humanitarian purpose of subsection 25(1) of *IRPA*.

[33] In his 2017 request for reconsideration, Mr. Ali submitted that his humanitarian and compassionate factors had to be reassessed in light of the teachings of the Supreme Court in *Kanthasamy*. He also identified additional humanitarian and compassionate considerations, which I will discuss in assessing the reasonableness of the 2017 decision.

[34] The Minister's Delegate accepted that the Supreme Court had criticized the "unusual and undeserved or disproportionate hardship" test in *Kanthasamy*. However, based on the Federal Court of Appeal's comments in *Lewis v. Canada (Public Safety and Emergency Preparedness)*,

2017 FCA 130 at para. 74, 23 Admin. L.R. (6th) 185, the Minister's Delegate concluded that the revised H&C test did not apply to danger opinions under subsection 115(2) of *IRPA*.

[35] The 2017 decision goes on to note that it was clear from the 2015 danger opinion that the Minister's Delegate had considered all of the humanitarian and compassionate factors that had been cited by Mr. Ali in coming to the conclusion that these factors did not outweigh the danger that he posed to the public in Canada.

[36] Mr. Ali asserts that the Minister's Delegate erred in law in concluding that *Kanthasamy* did not apply in the danger opinion context. According to Mr. Ali, a full consideration of the humanitarian and compassionate considerations at play in his case was required in the context of the danger opinion, and the Minister's Delegate erred in law by failing to follow the Supreme Court's guidance in *Kanthasamy* in assessing the humanitarian and compassionate factors in his case.

[37] I do not need to decide whether the comments of the Federal Court of Appeal in *Lewis* apply in the danger opinion context. This is because I am satisfied that notwithstanding the Minister's Delegate's use of the phrase "unusual and undeserved or disproportionate hardship", the assessment carried out by the Minister's Delegate in the 2015 danger opinion nevertheless satisfied the requirements of *Kanthasamy*.

[38] That is, a review of the 2015 decision shows that the Minister's Delegate took a holistic approach in considering all of Mr. Ali's personal circumstances, in line with the approach advocated by the Supreme Court in *Kanthasamy*. Consequently no basis has been shown for the Court to intervene in this regard.

III. The Reasonableness of the 2017 Decision

[39] This takes us to Mr. Ali's final argument, which is that the 2017 decision refusing to reconsider the 2015 danger opinion was unreasonable in three respects. Mr. Ali submits that the Minister's Delegate's treatment of his new evidence regarding his health was unreasonable, as was the treatment accorded to evidence regarding the drought in Somalia. The Minister's Delegate further erred, Mr. Ali says, in relying on findings made by the Immigration Division of the Immigration and Refugee Board with respect to his alleged membership in the "Bloods" gang.

[40] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190 and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59, [2009] 1 S.C.R. 339.

[41] Insofar as the evidence concerning Mr. Ali's health was concerned, he provided the Minister's Delegate with medical evidence indicating that he suffered from "hammer toes", as well as a cyst on his neck. The Minister's Delegate accepted that this was "new evidence", but found that insufficient evidence had been provided to show that these conditions were so significant that they would have affected the 2015 assessment.

[42] Mr. Ali submits that the Minister's Delegate's treatment of the evidence regarding his health was unreasonable, and that it should have been sufficient to merit a re-opening of the decision. This is essentially an invitation to re-weigh the evidence that was before the Minister's

Delegate and to arrive at a different conclusion. That is not the role of this Court sitting in review of an administrative decision such as a danger opinion.

[43] Mr. Ali further submits that in *Clarke v. Canada (Citizenship and Immigration)*, 2017 FC 393, [2017] F.C.J. No. 389, this Court stated that "when the criteria for new evidence is met, the evidence must be forwarded to a Minister's delegate for review whereupon the delegate 'will reconsider' the original opinion". The Court went on to observe that "[n]othing in the *IRPA*, the regulations or the Manual suggests that the Delegate has the discretion to vary the process set out in the Manual, or as an exercise of his or her discretion, identify and impose an evidentiary criteria other than that specified": both quotes from para. 31.

[44] In my view, the decision in *Clarke* is readily distinguishable from the present case. In *Clarke*, the Court found as a fact that the Minister's Delegate had not conducted a reconsideration of the original danger opinion. Instead, the Minister's Delegate simply determined that the evidence was not "particularly novel" and therefore refused to re-open the decision.

[45] It is true that in this case, the Minister's Delegate concluded the 2017 decision by stating that the "request to reopen the danger opinion is refused". However it is evident from the eight single-spaced pages of analysis that the 2017 decision was in fact a careful reconsideration of the 2015 danger opinion in everything but name.

[46] Insofar as the evidence regarding the ongoing drought in Somalia is concerned, this evidence was specifically considered by the Minister's Delegate, who concluded that while the drought was of "great concern" and that "thousands of people" had been displaced, the articles

provided by Mr. Ali "did not describe a persistent crisis". The Minister's Delegate further found that the weather situation in Somalia was "not sufficiently material in terms of risk or humanitarian and compassionate considerations specific to the subject to support the reopening of the opinion". Mr. Ali submits that this finding was unreasonable, as the evidence of drought pointed to the conclusion that the country conditions were not the same as they were at the time of the 2015 danger opinion.

[47] It is clear from a review of the 2015 danger opinion that the Minister's Delegate was well aware that conditions in Somalia were very difficult. The Minister's Delegate expressly addressed the evidence adduced by Mr. Ali in support of his application to have the 2015 decision reconsidered, including the evidence regarding the prevailing weather conditions in that country. The evidence was thus clearly not overlooked, and once again, Mr. Ali's submissions are essentially a request that this Court reweigh the new evidence provided by Mr. Ali.

[48] Finally, although counsel for Mr. Ali stated that she was "not pressing" this submission, she also asserted that the Minister's Delegate had erred in the 2015 danger opinion by relying on factual findings that were made by the Immigration Division of the Immigration and Refugee Board regarding Mr. Ali's membership in the "Bloods" gang, whose members had been responsible for the home invasion. According to Mr. Ali, his involvement in the home invasion had been "limited", and he should not be held accountable for the actions of others, essentially arguing that he had been the victim of guilt by association.

[49] Mr. Ali has failed to persuade me that the Minister's Delegate erred in 2015 in concluding that he was a member of a criminal gang by relying on the 2012 findings of the

Immigration Division, which had found him to be inadmissible to Canada for involvement in organized criminality.

[50] First of all, it must once again be recalled that this is *not* an application for judicial review of findings that were made in the context of the Minister's Delegate's 2015 decision. If Mr. Ali had concerns about the Minister's Delegate's reliance on the findings of the Immigration Division with respect to his involvement with the "Bloods" gang, the proper way to address those concerns was by seeking judicial review of the 2015 decision, and not by mounting a collateral attack on those findings through a request for reconsideration, some two years later.

[51] I have, moreover, reviewed the sentencing reasons of the judge who dealt with the criminal charges arising out of the home invasion. While it is true that the judge found that Mr. Ali had played the most limited role of any of the four individuals participating in the event, the judge nevertheless found Mr. Ali guilty of having assaulted the adolescent son of the homeowner. He further found that all four individuals, including Mr. Ali, had been "actively involved in trafficking in crack cocaine" out of the home. It is thus clear that this was not simply a case of "guilt by association", and that Mr. Ali was being held to account for his own actions, and not just for the actions of others.

IV. Conclusion

[52] For these reasons, the application for judicial review is dismissed. I agree with the parties that the case does not raise a question that is appropriate for certification.

JUDGMENT IN IMM-4786-17

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

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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