Date: 199711--

Docket: IMM-2115-96

BETWEEN:

TELMAN VALDMIR ASTUDILLO

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON J.:

[1] These reasons arise out of an application for judicial review of a decision reached on behalf of the respondent, pursuant to subsection 70(5) of the ***Immigration Act***,[1] that the respondent is of the opinion that the applicant constitutes a danger to the public in Canada. The decision is dated the 3rd of November, 1995 and was served on the applicant on the 20th of June, 1996.

[2] The application for leave and for judicial review in this matter indicates that the applicant also seeks judicial review of the removal order made against him. The removal order is not identified with any particularity on the face of the application for leave and for judicial review. In any event, material filed on behalf of the applicant and argument advanced on behalf of the applicant before me did not address judicial review of the removal order. Further, and perhaps more importantly, the Order of this

[1] R.S.C. 1985, c. I-2

Court granting leave in this matter relates only to the danger opinion.

[3] The factual background may be briefly summarized as follows. The applicant was born in Chile in 1974. He left that country with his family in 1975 when his father, a political refugee, fled to Argentina. In 1976, the applicant, together with his family, resettled in Canada under the auspices of the United Nations High Commission for Refugees.

[4] In Canada, the applicant accumulated a significant criminal record both as a youth and as an adult. His most recent convictions, for possession of an unregistered weapon, possession of a prohibited weapon and robbery, all arose out of a single occurrence although the robbery conviction did not occur until after his release from incarceration for the weapons offenses.

[5] By letter dated August 8, 1995, the applicant was notified that the respondent was contemplating issuing an opinion that the applicant constitutes a danger to the public in Canada. Extensive documentation was provided to the applicant on which the Minister proposed to rely. However, some documentation indicated as being documentation on which the Minister proposed to rely, was not provided to the applicant. This included a CPIC printout, police occurrence reports and a Correctional Service report. The applicant was provided an opportunity to make submissions and he availed himself of the opportunity through his then counsel. In those submissions, counsel commented on the material not provided in the following terms:

> It is correct that Mr. Astudillo has a copy of the Correctional Service Report, however the copy given to him and the copy on the Immigration file are different and Mr. Astudillo has no assurance that the copy before the Minister in this application does not differ. Neither the CPIC printout nor the police occurrence reports were disclosed by way of the CIC file.
>
> It is my understanding that the CPIC printout is a copy of Mr. Astudillo's criminal record. However I have no assurance of that nor is there any assurance that the material before the Minister is correct. Mr. Astudillo should be given the opportunity to respond to any and every allegation, especially allegations

> concerning his record.
>
> Lastly and most importantly is the non-disclosure of documentation called police occurrence reports. Mr. Astudillo has no idea, nor does his counsel, of what is contained in these reports. If it is simply the police synopsis of incidents leading to charges, it has been disclosed before and should be made available to Mr. Astudillo now. In any event, great caution must be had in the review of such synopses. Often times, facts alleged do not correspond to the facts upon which one is convicted. I am more concerned, however, that the reports contain evidence or opinion to which the respondent has never had access.
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> My client is clearly put in the position of having to answer something he may not even know exists. This is clearly contrary to the rules of natural justice. In this case, where a finding against Mr. Astudillo could result in the removal of appeal rights and deportation, it is clear that a quasi-judicial process involving full disclosure must be engaged. It is submitted that without such disclosure the process is flawed and profoundly contrary to the principles of natural justice.
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> This concern is not merely academic. One of the documents not disclosed was Mr. Astudillo's Correctional Service Report. We did obtain a copy of this report which raised great concern for Mr. Astudillo's psychological make-up. In an attempt to deal with these concerns, Mr. Astudillo has sought and we submit, a more formal opinion concerning his psychological state. In this report, Dr. Dalby refers to this report and with respect to the Institution Records states that the "expressed opinions are not presented with objective data to support them." He also states that in contrast to his own testing the validity scales were elevated and agrees that the results should be viewed with great caution. Dr.Dalby questions altogether the interpretation of that testing. Unfortunately, Mr. Astudillo has no way of knowing what other errors or invalid information might be contained in the non-disclosed documentation before the Minister.

[6] The respondent's material and the submissions on behalf of the applicant were considered by a Reviewing Officer in the respondent's department of government. The Reviewing Officer recommended that a danger opinion be issued. This recommendation was concurred in by the Director of Case Research and Review, Case Management Branch in the respondent's department. In the result, the opinion was issued by a delegate of the Respondent that the applicant constitutes a danger to the public in Canada.

[7] In the ***Williams v Canada (Minister of Citizenship and Immigration),***[2] an appeal of a decision of the Trial Division on judicial review of a ministerial danger to the public opinion, Mr. Justice Strayer wrote:

> There is ample authority that, unless the overall scheme of the Act indicates otherwise through e.g. an unlimited right of appeal of such an opinion, such subjective decisions cannot be judicially reviewed except on grounds such as that the decision-maker acted in bad faith, or erred in law, or acted upon the basis of irrelevant considerations. Further, when confronted with the record which was, according to undisputed evidence, before the decision-maker, and there is no evidence to the contrary, the Court must assume that the decision-maker acted in good faith in having regard to that material. [citations omitted; underlining added by me for emphasis]

[8] The words "such as" in the foregoing quotation would tend to indicate that the grounds of review thereafter enumerated are not exclusive. That this might not be the case appears to have been Justice Strayer's intent since, later in his reasons, he wrote:

> The issue is whether it can be said with any assurance that the Minister's delegate acted in bad faith, on the basis of irrelevant criteria of evidence, or without regard to the material.

[9] In the latter quotation, I take the reference to "...on the basis of irrelevant criteria or evidence, or without regard to the material," to be the equivalent of "...upon the basis of irrelevant considerations" in the earlier quotation. Further, I take the lack of a reference to error of law as a ground of review in the second quotation to simply be based on the facts that were before Mr. Justice Strayer which demonstrated no error of law.

[10] While Mr. Justice Strayer made no direct reference to reliance on extrinsic evidence as a

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[2] [1997] 2 F.C. 646 (C.A.), leave to appeal to the Supreme Court of Canada dismissed (without reasons) 16 October 1997, [1997] S.C.C.A. No. 332 (QL)

grounds for judicial review, he did not explicitly rule it out, and I cannot conclude that he meant to overrule the decision in ***Shah v. the Minister of Employment and Immigration***[3] where Mr. Justice Hugessen, by reference to an application for landing from within Canada, certainly as clearly a purely discretionary administrative decision as the one at issue here, wrote:

> Of course, if she [the Minister respondent in this matter] is going to rely on extrinsic evidence, not brought forward by the applicant, she must give him a chance to respond to such evidence.

[11] Here, I am satisfied that the CPIC printout, the police occurrence reports, and the Correctional Service report can be described as "extrinsic evidence". They were not provided by the applicant. Nor could they, with any certainty, be said to be available to the applicant. The question then remaining is whether the respondent's delegate can be presumed to have relied on the undisclosed material.

[12] By reference to the underlined sentence in the first quotation from Mr. Justice Strayer above, this Court must assume, in the absence of evidence to the contrary, that the Minister's delegate acted in good faith in having regard to <u>all</u> of the material that was before her or him. The Reviewing Officer's memorandum for the use of the Minister's delegate concluded with the following paragraph:

> Note: A 70(5) letter to the client dated August 8, 1995 indicated that a CPIC Printout, Police Occurrence Reports and a Correctional Service Report were attached to the letter and would be used in determining whether this person should be considered as a "danger to the public". These three items were NOT included in that letter and therefore are not included in this submission.

[13] Thus, as I read the foregoing quotation, the material that I regard as extrinsic was not before the Minister's delegate. But the quotation does not indicate that the extrinsic material was not taken into

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[3](1994), 170 N.R.page 238 (F.C.A.)

account by the Reviewing Officer who prepared the memorandum and recommendation for the Minister's delegate. My reading of the whole memorandum would lead me to the opposite conclusion, that is to say, that the officer preparing the memorandum and recommendation did have regard to the extrinsic material. If I am correct in this, and if it is fair to assume that the Minister's delegate gave weight to the Reviewing Officer's memorandum and recommendation, then I conclude that the Minister's delegate, notwithstanding that the CPIC printout, police occurrence reports and Correctional Service report were not directly before her or him, indirectly relied on those materials, not brought forward by the applicant, without giving the applicant a chance to respond to them and thus rendered her or his opinion open to judicial review.

[14] Any argument that the concern I have expressed about indirect reliance on what I consider to be extrinsic evidence might be immaterial by reason of the applicant's extensive criminal record given his age is, I am satisfied, offset by three factors as follows: first, the officer who concurred in the Reviewing Officer's recommendation wrote the following note in long hand underneath his signature:

> This is a particulary difficult case to assess in consideration of the strong and compelling factors outlined in the submission. The fact that the person concerned has been in Canada since a tender age and is essentially no longer connected with Chile; that he has strong family ties in Canada and that he is a young adult, are all valid considerations. Never the less, given the degree of criminality in terms of volume and intensity, both from a personal injury and property perspective, I must agree that a finding of "danger" would in my view be justified.

second, the foregoing commentary follows the Reviewing Officer's comments which commence with the following:

> This person took part in a particularly vicious robbery during which he held a stun gun to the victim's head and warned him that he would die if he moved.

Counsel for the applicant advised that nowhere in the material that forms the record for this matter is there any indication that the applicant held any form of weapon to the victim's head. Certainly, I have

found no such reference. That is not to minimize the role of the applicant in a robbery where he brandished two weapons and certainly made threats. It is simply to state that the accuracy of the Reviewing Officer's comments and summary are immediately put in doubt. Finally, the file material contains the following statement:

> He [the applicant] was given an opportunity in March 1994 to change his life style when he was 27(1) reported and given a Stern Warning. He failed to heed that warning.

Counsel for the applicant argued, and I am in agreement, that these sentences can only be read as indicating that the applicant committed the robbery of which he was convicted after receiving the warning. That is simply not the case. Though he was convicted after the warning, the robbery had taken place before the warning. There is no evidence that the applicant was convicted of any offence committed after the warning was delivered to him.

[15] While the three foregoing concerns would not, of themselves, lead me to conclude that this application for judicial review should be allowed, when taken together with the failure to provide the applicant an opportunity to respond to documents that, on the face of the material, I presume to have been before the Reviewing Officer, thus leading the respondent's delegate to indirectly rely on extrinsic evidence, satisfy me that this application should be allowed.

[16] For the foregoing reasons, this application for judicial review will be allowed, the decision of the respondent's delegate that in her or his opinion, the applicant represents a danger to the public will be set aside, and the matter will be referred back to the respondent or a different delegate for redetermination. For clarity, I wish to emphasize that on the basis of the material before the Court, an opinion that the applicant represents a danger to the public in Canada might very well be open to the respondent or her delegate. However, in reaching such an opinion, there is a duty of fairness on the

respondent that was not met in the process leading to the decision under review.

[17] This application was heard before at Calgary, Alberta, on the 22nd of April, 1997. Issues identified in the applicant's Memorandum of Fact and Law that were dealt with by the Federal Court of Appeal in ***Williams***[4], were not argued before me but, because it was then generally known that leave would be sought to appeal the ***Williams*** decision to the Supreme Court of Canada, counsel for the applicant requested that the hearing be adjourned to await the outcome of any such application. I acceded to that request. As noted earlier, an application to appeal to ***Williams*** decision has been dismissed without reasons. Counsel have since been contacted through the Registry in Calgary and are in agreement that no purpose would be served in reconvening. Thus, I have treated this matter as closed and finalized these reasons.

[18] If counsel for either party wishes to propose a question for certification, it should be submitted to the Registry in Calgary within seven days of the date of these reasons. At that time, I will consider any such submissions and issue my order.

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Judge

Ottawa, Ontario
November 24 , 1997

[4] *Supra*, note 2.