Date: 20081209

Docket: IMM-795-08

Citation: 2008 FC 1349

Toronto, Ontario, December 9, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

SUWALEE IAMKHONG

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application deals mainly with the reasonableness and adequacy of reasons for the preparation of an inadmissibility report, and its subsequent referral to the Immigration Division, pursuant to subsections 44(1) and 44(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27. For the reasons that follow, I am of the view that the application must be dismissed.

Background

[2] In 1969 the applicant was born in a small rural community in Thailand. In 1994, with a grade four education, she travelled to Hong Kong, to work as an exotic dancer. She was sexually active with clients, and soon after arriving in Hong Kong she had her blood tested; she was told that she was HIV-positive. Two weeks after the blood test she received a work visa to enter Canada to work as an exotic dancer, which she did from her arrival in Canada in 1995 until her arrest in 2004 on the criminal charges that brought her to the attention of the immigration authorities.

[3] Four months after her arrival and as part of the visa renewal process, the applicant had a medical examination, which included a blood test. The test results were acceptable and the visa was renewed. The visa continued to be renewed periodically for some considerable time. The applicant maintains that she mistakenly thought that the blood test she took for her visa renewal included an HIV test. Because the visa was renewed she claims that she thought, again mistakenly, that the HIV- positive result in Hong Kong was an error.

[4] In 1997, the applicant married a Canadian citizen. In February of 2004, the applicant became ill and was diagnosed as HIV-positive. Her husband was advised of her status and a blood test disclosed that he too was HIV-positive. The applicant and her husband have separated. Criminal charges were laid against the applicant as a consequence of her having infected her husband. On January 16, 2007, the applicant was convicted of criminal negligence causing bodily harm and aggravated assault, under sections 221 and 268 of the *Criminal Code*. On August 16, 2007, the

applicant was sentenced to three years, less one year of credit for time served in pre-trial detention, on each count, to be served concurrently.

[5] Persons in Canada who are not citizens may be removed from Canada if they have been convicted of serious criminality, as the applicant has. On November 30, 2007, the applicant was interviewed by an immigration officer at the detention center where she is serving her sentence. The applicant was accompanied by a representative of the Asian Community AIDS Services. At the interview the officer explained to the applicant the purpose of the interview, which was being held in light of section 44(1) of the Act, which provides as follows:

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	**44.** (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

[6] The officer provided an affidavit in this proceeding, in which she states that she explained to the applicant that due to the length of her sentence, she might lose the right to appeal if a removal order were to be issued against her. Section 64 of the Act provides that no appeal to the Immigration Appeal Division lies where a person has been found to be inadmissible on grounds of serious criminality, which is defined for these purposes to be a crime that was punished by a term of imprisonment of at least two years. In the applicant's circumstances she was to serve a sentence of three years and thus has no appeal rights to the IAD.

[7] The officer attests that the interview focused on the applicant's circumstances, including her health, her need for medical care, her immigration history and length of time in Canada, her criminal history, education, work experience, her family in Canada and in Thailand, the details of her sentencing, her future plans, the degree of her establishment in Canada and her financial means. The handwritten notes in the certified tribunal record confirm that these were all areas canvassed by the officer. In addition, the applicant was told that she could send further submissions for consideration.

[8] On December 13, 2007, the officer received 20 pages of written submissions and supporting documents from the applicant's counsel. These submissions are entitled "Request for Discretionary Relief from the A40(1) Inadmissibility Report". In these submissions, applicant's counsel provided further details concerning the applicant including her status in Canada, the absence of previous criminality, the fact of her cooperating and being forthcoming with information, that she had never made misrepresentations to CIC or to CBSA, her 12 years of residency in Canada, her close relationship with her sister in Canada and their joint catering business, her involvement in the Thai HIV AIDS community, the circumstances surrounding her HIV testing as outlined above, her remorse for having caused her husband to contract HIV, the hardship she would face if she were to be sent back to Thailand, including limited availability of medication and her inability to afford medication, and, as a consequence, her shortened life expectancy.

[9] The officer attests that on December 17, 2007, she decided to prepare the subsection 44(1) report, and that the report was prepared on January 7, 2008 (although it bears the former date of

December 17, 2007). In it the officer summarizes the information that was obtained during the oral interview and notes that written submissions were received from the applicant's counsel and that these were considered. The officer's conclusion is as follows:

> The subject showed great remorse for her actions as well as a great desire to remain in Canada. However, the writer cannot disregard the severity of the criminal conviction, the sentence imposed and that the courts did not find the subject's claim of ignorance of her disease to be credible. Also that the subject did not disclose her medical history to CBSA at any time, including at her original entry or on the numerous applications to extend her status that she submitted.
>
> Taking into account all information available, including submissions provided by the subject's lawyer on her behalf, humanitarian and compassionate factors and being aware of it due to the length of sentence received the subject may not have the right to appeal a removal order if issued, it is the recommendation of the writer that the subject be referred to a disability hearing. Further, it is the recommendation of the writer that a warrant be issued and subject placed in detention awaiting admissibility hearing.

[10] The applicant, in her submissions, makes much of the fact that the narrative report which the officer says was prepared on January 7, 2008, makes reference to the fact that the applicant had appealed her criminal conviction. As the applicant notes, her counsel forwarded a copy of the notice of appeal of the criminal conviction on January 8, 2008 - one day after the narrative report was prepared. It is submitted that this discrepancy proves that the officer was either influenced by her manager when making the subsection 44(1) determination or that the manager actually made the decision. I am not convinced that this discrepancy, if indeed it is one, proves anything of the sort.

[11] The certified tribunal record includes a letter from Eva Sin of the Asian Community AIDS Services dated November 28, 2007. This letter was submitted by the applicant to the officer on

December 13, 2007, as a part of her submissions supporting her request that an inadmissibility report not be prepared. Ms. Sin states in her letter of support that the criminal conviction is under appeal. Thus, the officer would have been aware of the appeal prior to receipt of the letter on January 8, 2008. Further, the cover letter of January 8, 2008, from applicant's counsel makes it clear that the notice of appeal is being forwarded to the officer "as requested". As such it is disingenuous for the applicant to now assert that the officer could not have known of the appeal prior to January 8, 2008. Lastly, the officer in the narrative report writes that the notice of appeal was filed October 19, 2007, whereas the notice forwarded to her by the applicant's counsel clearly indicates in the notice and cover letter that it was filed October 20, 2007. It seems very odd that the officer would have gotten the date of filing wrong if she had, in fact, relied on the information contained in the January 8, 2008 letter. Accordingly, in my view, the applicant has failed to establish that the decision was not made and prepared on the dates stated by the officer.

[12] On January 14, 2008, the Minister's delegate signed the narrative report with the following notation:

> I have reviewed all the information provided. Have taken into consideration the H&C factors as well as the fact that subject will not have any appeal rights. I feel that an admissibility hearing is appropriate in this case. Also a warrant is appropriate as well.

This constituted the subsection 44(2) decision. Subsection 44(2) of the Act reads as follows:

44. (2**)** If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a	44. (2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire

permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

[13] The officer met again with the applicant on February 4, 2008. The applicant provided an affidavit in which she attests that she was told that the officer's manager had made the decision to make an admissibility report and that "she did not tell me what the reasons were for this decision". For her part, the officer attests that at the meeting on February 4, 2008, she did explain to the applicant that she wrote the report because she was of the opinion that the applicant was inadmissible pursuant to subsection 36(1)(a) of the Act due to having been convicted and sentenced for aggravated assault and criminal negligence causing bodily harm. She attests that she advised the applicant that her manager had referred the applicant to an admissibility hearing and that she gave the applicant a copy of the narrative report that she had written. Although the applicant says that she was not told why the report was written and the referral to an admissibility hearing made, it is of note that the applicant has not challenged, either in her affidavit or as a ground of review in this proceeding, that she was in fact provided with a copy of the narrative report. That narrative report does indicate the reasons why these steps were taken, although, so the applicant alleges, not sufficiently.

[14] An application was filed February 19, 2008, seeking leave to commence an application for "judicial review of the decision of enforcement officer, Sarah Blanchett and her supervisor, Klaudios Mustakas, which was communicated to the applicant on February 4, refusing her request for relief from the s. 44(1) Inadmissibility Report…".

[15] The respondent was asked, pursuant to the *Federal Courts Immigration and Refugee Protection Rules,* for the reasons for the decision subject to the application. Three pages were provided in response to that request, a two-page Report Under Section 44(1) of the Act dated January 7, 2008, together with one-page of notes of the meeting of the officer and the applicant on February 4, 2008.

[16] Subsequent to the granting of leave in this matter, Canadian Border Services Agency provided the Court and parties with the certified tribunal record under cover of letter dated September 17, 2008. The certified tribunal record comprises some 117 pages, including the narrative report of the officer discussed above.

[17] In addition to the applicant's own affidavit, she also filed an affidavit of Eva Sin, a support worker with the Asian Community AIDS Services, who was present with the applicant during her initial interview on November 30, 2007. That affidavit contains a paragraph, based on information and belief, that sets out a conversation between counsel for the applicant and the Minister's delegate on February 19, 2008, together with applicant's counsel's note of her conversation.

[18] Ms. Sin's affidavit also includes her notes of the November 30th interview with the officer. To the extent that the applicant has suggested otherwise, these notes, in my view, support the officer's assertion that she explained that the process under section 44 involved two-steps that firstly involved her and that secondly involved her manager, the Minister's delegate, who would make the decision whether to refer the applicant to an inadmissibility hearing.

Issues

[19] The applicant proposes the following as issues to be determined:

(a) Whether an officer has the discretion to decide whether or not to make a report under subsection 44(1) and whether the Minister's delegate has the discretion to refer the report under subsection 44(2) of the Act;

(b) Whether the officer and Minister's delegate breached their duty of fairness to the applicant by failing to give adequate reasons for their decisions;

(c) Whether the officer and Minister's delegate fettered their discretion in not taking into consideration the particular circumstances of the applicant when making the decisions under subsections 44(1) and (2); and

(d) Whether the decisions of the officer and Minister's delegate were unreasonable.

Preliminary Matters

[20] The respondent raised two preliminary matters. First, the respondent submits that the application for judicial review is improper in that it concerns two decisions, rather than a single decision. Rule 302 of the *Federal Courts Rules* provides: "Unless the Court orders otherwise, an

application for judicial review shall be limited to a single order in respect of which relief is sought". In this case, the application for judicial review relates to two decisions - the decision of the officer and the decision of the Minister's delegate. The respondent submits that the applicant ought to have filed two applications for leave and for judicial review challenging the two decisions in two separate proceedings and, having failed to do so, the applicant is precluded from challenging the decision reached by the Minister's delegate under subsection 44(2) of the Act, because she did not file a separate application for leave challenging that distinct decision.

[21] The respondent is quite correct in his interpretation of Rule 302 and the requirement that each application for judicial review address only one decision or order. The applicant has failed to comply with that Rule. In circumstances such as those here, where there are two separate decisions made, each decision ought to be subject to an application for leave and for judicial review. In the interest of saving judicial resources, the Court typically schedules both applications, provided leave is granted, to be heard together: see for example *Leong v. Canada (Solicitor General)*, [2004] F.C.J. No. 1369; *Hernandez v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 533; *Hernandez v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2007] F.C.J. No. 965; and *Richter v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J.. No. 1033.

[22] In the unique circumstances of this case, I am prepared to issue an order that the decisions of each of the officer and the Minister's delegate under subsections 44(1) and (2), respectively, be dealt with together in this single judicial review application. This should not be interpreted as a precedent to suggest that it is appropriate to file single applications when dealing with the two

decisions referenced in section 44 of the Act – it is not. In this case, however, the objection was raised late and all of the materials required were before the Court, including full submissions on both decisions.

[23] Secondly, the respondent objects to the evidence tendered by the applicant relating to her counsel's conversation with the Minister's delegate. The respondent submits that the content of this conversation is not a fact within the personal knowledge of the affiant as is required by Rule 81, as she was not a party to the conversation. The respondent takes the position that the evidence that the applicant wishes to tender does not fall within any of the exceptional circumstances when evidence on information and belief may be accepted.

[24] The applicant submitted that the evidence is a business record of the affiant, Eva Sin, and thus an exception to the hearsay rule. There is no doubt that counsel's note of her phone conversation is her own business record, but merely providing it to an affiant to be included in her affidavit does not then make it that person's business record. This note is not a document that the affiant or the Thai Community AIDS Services, with which she is engaged, prepared in the usual and ordinary course of its business. It is not a business record admissible in this proceeding in the manner in which it was tendered. Had the applicant wished to ask the Court to consider this document, and the conversation, then it ought to have been tendered through an affidavit from her counsel although that would have prevented counsel from appearing at this hearing: see Rule 82. For these reasons, the respondent's objection to this evidence is upheld. In any event, the evidence of the conversation that the applicant wished to tender would not, in my view, have affected the outcome of this matter.

The Decisions and Their Reasons

[25] As noted, the documents provided on April 7, 2008, pursuant to Rule 9 of the *Federal Courts Immigration and Refugee Protection Rules* did not contain the narrative report that was included with the certified tribunal record. The applicant submitted that the narrative report ought not to be accepted as part of the record or as the reasons for the decisions under review as they were not provided pursuant to Rule 9 and because the applicant was prejudiced as her arguments were based on the materials submitted pursuant to Rule 9. I reject both submissions.

[26] I agree with the respondent that the failure to include the narrative report in the Rule 9 disclosure was likely a clerical error and that the applicant was not prejudiced as it was produced in the certified tribunal record in sufficient time for both parties to make detailed submissions, in writing and orally, on the reasons it discloses. A similar situation occurred in *Abdeli v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2006] F.C.J. No. 1322. As was noted by Justice Kelen, although the narrative report was not provided in the initial response under Rule 9, but only later as a part of the certified tribunal record, it did constitute the "reasons" for the decision and was properly before the Court.

Discretion In Section 44 Decisions

[27] The applicant, in her submissions on the leave application, stated "this case brings into question the boundaries of the discretionary power of an officer to make a decision as to whether or not to file a 44(1) Inadmissibility Report against a permanent resident, particularly one who is barred from making an appeal to the Immigration Appeal Division of her removal".

[28] As has been noted, at the time the applicant wrote those submissions, she did not have the benefit of the officer's narrative report, or the reasons of the Minister's delegate. Based on the brief document that she did have, it appeared that neither the officer nor the Minister's delegate had considered anything other than the fact of conviction and the sentence imposed. On those facts, the applicant was correct as to the issue the application appeared to raise.

[29] There is some difference of opinion in this Court's jurisprudence as to whether an officer has discretion under subsection 44(1) when making an admissibility report, and if so the extent of that discretion: see *Hernandez v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 533; *Hernandez v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2007] F.C.J. No. 965; *Awed v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J.. No. 645; *Spencer v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1269; *Richter v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 1033. Accordingly, on the right facts, these questions would require examination. However, in this case it is now clear from the record that both the officer and the Minister's delegate did consider that they had discretion when making the decisions required of them under section 44. Further, the record also indicates that each did consider a variety of factors when determining whether or not to exercise their discretion. Even if these persons exceeded their jurisdiction in considering that they had discretion, both considered that they had discretion. Thus, the issue, as framed by the applicant, does not arise on the facts of this case.

[30] In my view, the only issues requiring the Court's examination on this application are the following:

(a) Whether the officer or the Minister's delegate failed to provide adequate reasons for their decisions; and

(b) Whether either of their decisions is unreasonable.

Analysis

Adequacy of Reasons

[31] Decisions made under section 44 of the Act have been held to be administrative decisions attracting a lower duty of fairness. Justice Snider in *Hernandez v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 533, described this as a "relaxed" duty of fairness. While some have held that no reasons are required for decisions made under this provision (see for example, *Lee v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 158, at para. 39), I am of the view that reasons are required, given the importance of the decision to the person being considered for removal. However, that is not to say that the reasons that are given must be of the detail required in quasi-judicial or judicial proceedings.

[32] In my view, the following comments of the Supreme Court in *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761, an extradition case, are applicable to a section 44 decision. The reasons need not be comprehensive nor analyze every factor, the test is whether they allow the person affected to understand why the decision was made and allow the reviewing court to assess the validity of the decision.

> As for the adequacy of the Minister's reasons, while I agree that the Minister has a duty to provide reasons for his decision; those reasons need not be comprehensive. The purpose of providing reasons is twofold: to allow the individual to understand why the decision was made; and to allow the reviewing court to assess the validity of the decision. The Minister's reasons must make it clear that he considered the individual's submissions against extradition and must provide some basis for understanding why those submissions were rejected. Though the Minister's *Cotroni* analysis was brief in the instant case, it was in my view sufficient. The Minister is not required to provide a detailed analysis for every factor. An explanation based on what the Minister considers the most persuasive factors will be sufficient for a reviewing court to determine whether his conclusion was reasonable.

[33] The officer's reasons indicate that she did consider the evidence presented concerning what the applicant described as H&C factors. While they supported the applicant's request that a subsection 44(1) report not be prepared, the officer reasoned that she could not disregard the severity of the crimes for which the applicant was convicted, the sentence imposed, the fact that the criminal court had not accepted the applicant's assertion that she was ignorant of her HIV-status, and lastly the fact that the applicant had never disclosed her status to the immigration authorities, either on initial entry or when subsequently renewing her work visa. In short, the officer found that these were the more persuasive factors and they resulted in her preparing the subsection 44(1) report.

[34] In my view, the applicant is able to read the narrative report and conclude, as I have, that the reasons for the subsection 44(1) report, despite the factors that weighed in her favour, were those outlined in the preceding paragraph. While someone else weighing the factors presented may have arrived at a different conclusion, the reasons for the officer's decision, in my view, are adequate.

[35] Similarly, in my view, the reasons of the Minister's delegate also meet the *Lake* standard as the Minister's delegate adopts and relies upon those of the officer.

Reasonableness of the Decisions

[36] We are to be guided by the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, and in particular paragraph 49:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[37] Decisions under section 44 of the Act are decisions that are unlikely, on the facts, to lend themselves to only one possible conclusion. On the facts of this case that is certainly true. I am unable to say that either the officer's decision or the Minister's delegate's decision falls outside the range of possible, acceptable outcomes. Despite the factors in the applicant's favour, those emphasized by the officer are appropriate factors to consider and they are factors that, in my view, support the preparation and referral of an inadmissibility report.

[38] Accordingly, this application is dismissed.

[39] The applicant submitted two questions for certification.

(a) What is the scope of: (i) the officer's discretion under subsection 44(1) of the *Immigration and Refugee Protection Act* in making a decision as to whether or not to prepare a report to the Minister or the Minister's delegate; and (ii) the discretion of the Minister's delegate, under subsection 44(2) of the *Immigration and Refugee Protection Act*, in making a decision as to whether to make a referral to the Immigration Division for an inquiry?

(b) What is the duty of fairness owed in respect of: (i) the officer's decision on whether to prepare a report under subsection 44(1) of the *Immigration and Refugee Protection Act*; and (ii) the decision of the Minister's delegate as to whether to refer such a report to the Immigration Division under subsection 44(2) of the *Immigration and Refugee Protection Act*?

[40] In order to certify a question for appeal the question posed must be a serious question of general importance which would be dispositive of an appeal.

[41] The first question posed by the applicant could not be dispositive of an appeal as the scope of discretion does not arise on the present facts. The duty of fairness owed under section 44 of the Act has been considered numerous times by this Court in the decisions referenced herein. There is

general agreement as to the duty owed. Further, the applicant has raised no duty that was not observed by the respondent. Accordingly, this would not be dispositive of an appeal.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. Pursuant to Rule 302, the decisions of the officer and the Minister's delegate have both been reviewed in this application for judicial review;
2. This application for judicial review is dismissed; and
3. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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