Federal Court  Cour fédérale

Date: 20121203

Docket: IMM-6450-11

Citation: 2012 FC 1411

Ottawa, Ontario, December 3, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

PANCHALINGAM NAGALINGAM

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision by the Immigration Officer (the Officer), pursuant to subsection 44(1) of the Act, that determined that there were reasonable grounds to believe that Mr. Panchalingam Nagalingam (the applicant) is inadmissible under paragraph 36(2)(*a*) of the Act.

Factual Background

[2] The applicant is a citizen of Sri Lanka and a Tamil. He arrived in Canada in August 1994. On March 2, 1995, he was found to be a Convention Refugee and he became a permanent resident on March 13, 1997.

[3] Between 1999 and 2001, the applicant was convicted of assault, failure to comply with a recognizance and mischief. Subsequently, the applicant was found to be inadmissible on grounds of organized criminality under paragraph 37(1)(*a*) of the Act because of his membership to the A.K. Kannan Tamil gang. A deportation order was issued against him on May 28, 2003, by virtue of which he also lost his permanent resident status. The Federal Court dismissed his application for judicial review of the decision on his inadmissibility (*Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1397, 134 ACWS (3d) 489).

[4] Because the applicant had been found to be a Convention Refugee, the Minister issued a danger opinion under paragraph 115(2)(*b*) of the Act on October 4, 2005 and it was determined that the applicant should not be allowed to remain in Canada based on the nature and severity of the acts he committed. The applicant sought judicial review and applied for a stay to this Court, but the stay was dismissed. The applicant then sought an injunction from the Ontario Superior Court which dismissed his application, relying partly on the assurance of the Minister that he would be allowed to return should his judicial review of the danger opinion be allowed.

[5] The applicant was removed from Canada on December 5, 2005. On April 24, 2008, the Federal Court of Appeal allowed the judicial review of the danger opinion and it was remitted back

for re-determination (*Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 153, [2009] 2 FCR 52). The applicant made a request to the Minister to allow him to return to Canada. While awaiting return to Canada, the applicant was allegedly kidnapped from his home in Colombo and tortured for more than two (2) days.

[6] The applicant returned to Canada on February 24, 2009 on a Temporary Resident Permit. Upon his return, he was initially detained but eventually released on strict terms and conditions.

[7] The Minister had initiated a reconsideration of the paragraph 115(2)(*b*) danger opinion prior to the applicant's return to the country. When another danger opinion was issued on February 23, 2011, concluding that the applicant should not be allowed to remain in Canada based on the nature and severity of his acts and was to be removed between March 23 and March 26, 2011, the applicant filed two (2) applications for leave and judicial review: one challenging the 2011 danger opinion, and the second seeking a declaration that the 2003 removal order was spent and of no remaining legal force. In the meantime, the applicant filed motions to stay his removal and initiated a petition with the United Nations Committee Against Torture (UNCAT), which granted the interim measures and requested that the removal be deferred. These interim measures were lifted when the Government of Canada successfully argued that the applicant's petition was inadmissible because domestic remedies had not been exhausted – namely, the two (2) judicial review applications.

[8] Justice Russell of the Federal Court heard both applications in October 2011 and allowed the judicial review of the danger opinion for a breach in procedural fairness because the applicant was not allowed to cross-examine a detective who provided evidence (*Nagalingam v Canada*

(Minister of Citizenship and Immigration), 2012 FC 176, 253 CRR (2d) 310). Justice Russell also allowed, in part, the judicial review of the 2003 removal order (*Nagalingam v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 362, 6 Imm LR (4th) 323). Justice Russell held that "the 2003 [Deportation] Order …, although valid when made, has now been executed and its force is spent. Hence, it cannot now be used as the basis of any future deportation of the Applicant and the Court prohibits the Respondent from using the 2003 Order to remove the Applicant from Canada."

[9] On September 9, 2011, the Officer issued a subsection 44(1) report stating that the applicant is inadmissible under paragraph 36(2)(*a*) of the Act for reasons of criminality, on the basis of the failure to comply with a recognizance and mischief under $5,000 convictions in September 2000 and January 2001. The applicant was served with the report on September 9, 2011, along with a notice to appear for a subsection 44(2) proceeding. The applicant was not interviewed prior to the issuance of the report and direction to inquiry, and was not permitted to make submissions. The interview was initially scheduled for September 13, 2011, but was postponed until September 16, 2011 at the applicant's request.

[10] The applicant was interviewed by a Minister's delegate and a new deportation order was issued against him on September 16, 2011 under subsection 44(2) of the Act. His deportation was initially scheduled for September 29-30, 2011. By letter dated September 23, 2011, the UNCAT informed the applicant's counsel that it had reinstated the interim measures request.

[11] The applicant claims he would have raised several considerations if given the opportunity, namely: his rehabilitation over the past decade; the time elapsed since the last offence and clear criminal record since (over eleven (11) years); his compliance with house arrest; his ongoing efforts to obtain a pardon; his marriage to Nira Rajanayagam and their daughter Alena; the fact that he cares for his elderly parents; his relationship to his family in Canada; the danger he faces in Sri Lanka and his Convention refugee status.

[12] In a decision dated February 21, 2012, the IAD determined that it did not have jurisdiction under subsection 64(1) of the Act to hear the applicant's appeal of the deportation order because he has been found inadmissible on grounds of organized criminality. The IAD's decision is under review in a separate application before this Court (IMM-2411-12).

The Impugned Decision

[13] The applicant takes issue with the Officer's decision to issue the subsection 44(1) report. The report, dated September 9, 2011, indicates that the applicant is a person who is a foreign national who has been authorized to enter Canada and who, in the Officer's opinion, is inadmissible pursuant to paragraph 36(2)(*a*) of the Act for having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment. The report states the following:

> MR. PANCHALINGAM NAGALINGAM WAS CONVICTED ON 25 SEPTEMBER 2000 AT TORONTO OF FAIL TO COMPLY CONTRARY TO SUBSECTION 145(3) OF THE *CRIMINAL CODE* OF CANADA AND WHICH IS PUNISHABLE BY IMPRISONMENT FOR A TERM NOT EXCEEDING TWO YEARS. HE WAS SENTENCED TO 5 DAYS JAIL AND 3 DAYS PRE-SENTENCE CUSTODY.
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> IN ADDITION, MR. PANCHALINGAM NAGALINGAM WAS CONVICTED ON 25 JANUARY 2001 AT TORONTO OF TWO COUNTS MISCHIEF UNDER $5000 CONTRARY TO SUBSECTION 430(4) OF THE *CRIMINAL CODE* OF

CANADA AND WHICH IS PUNISHABLE BY IMPRISONMENT FOR A TERM NOT EXCEEDING TWO YEARS. HE WAS SENTENCED TO 45 DAYS JAIL INTERMITTENT, 2 YEARS PROBATION, AND 16 DAYS PRE-SENTENCE CUSTODY.

Issue

[14] The applicant submits the following issue: Did the Officer err in law and breach the duty of procedural fairness by failing to take into account humanitarian and compassionate considerations and/or by failing to give the applicant an opportunity to make submissions on the issue prior to issuing the report and directing the applicant to inquiry?

Legislative provisions

[15] The following provisions of the *Immigration and Refugee Protection Act* are relevant to the present case:

PART 1 IMMIGRATION TO CANADA	PARTIE 1 IMMIGRATION AU CANADA
DIVISION 4 INADMISSIBILITY	SECTION 4 INTERDICTIONS DE TERRITOIRE
…	[…]
Serious criminality	Grande criminalité
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
…	[…]
Criminality	Criminalité
(2) A foreign national is inadmissible on grounds of criminality for	(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les

	faits suivants :
(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;	*a*) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;
…	[…]
Application	Application
(3) The following provisions govern subsections (1) and (2):	(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :
(*a*) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;	*a*) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;
(*b*) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect under the *Criminal Records Act*, or in respect of which there has been a final determination of an acquittal;	*b*) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquittement rendu en dernier ressort ou en cas de suspension du casier — sauf cas de révocation ou de nullité — au titre de la Loi sur le casier judiciaire;
…	[…]

DIVISION 5
LOSS OF STATUS AND REMOVAL

SECTION 5
PERTE DE STATUT ET RENVOI

Report on Inadmissibility

Constat de l'interdiction de territoire

Preparation of report

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.

Rapport d'interdiction de territoire

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.

Referral or removal order

(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 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.

Suivi

(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 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.

Conditions

(3) An officer or the Immigration Division may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer

Conditions

(3) L'agent ou la Section de l'immigration peut imposer les conditions qu'il estime nécessaires, notamment la remise d'une garantie d'exécution, au résident permanent ou à l'étranger qui

or the Division considers necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, being in Canada, a removal order.	fait l'objet d'un rapport ou d'une enquête ou, étant au Canada, d'une mesure de renvoi.

[16] Furthermore, the following provision from the *Immigration and Refugee Protection Regulations*, SOR/2002-227 is also relevant since it establishes that, in the applicant's case, the Minister's delegate does not refer the report to the Immigration Division but instead produces the removal order, in this case a deportation order, him or herself:

DIVISION 2 SPECIFIED REMOVAL ORDER	SECTION 2 MESURES DE RENVOI A PRENDRE
Subsection 44(2) of the Act – foreign nationals	Application du paragraphe 44(2) de la Loi : étrangers
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 :
(*a*) if the foreign national is inadmissible under paragraph 36(1)(a) or (2)(a) of the Act on grounds of serious criminality or criminality, a deportation order;	*a*) en cas d'interdiction de territoire de l'étranger pour grande criminalité ou criminalité au titre des alinéas 36(1)a) ou (2)a) de la Loi, l'expulsion;
…	[…]

Standard of review

[17] The issue submitted before this Court concerns a potential breach of procedural fairness. It is therefore reviewable on a standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 at para 16, [2007] 1 FCR 409 [*Cha*]).

Arguments

Applicant's Position

[18] The applicant argues that the Officer erred in law by not considering all relevant circumstances and failing to give him the opportunity to provide submissions on why a subsection 44(1) report should not be written and referred to a Minister's delegate for decision.

[19] The applicant relies heavily on Justice Harrington's summary and analysis of relevant caselaw and factors as set out in *AMM v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 809 at paras 18-31, [2010] 3 FCR 291 [*AMM*]. *AMM* discusses the matters of the discretion available to enforcement officers whether to issue (or not) a subsection 44(1) report, the level of procedural fairness required with regards to such reports and what factors need to be considered by enforcement officers when authoring such reports.

[20] The applicant submits that in *AMM*, as well as in many of the cases reviewed in *AMM*, a narrative report had been produced by the officer setting out the circumstances of the case and factors taken into consideration. The applicant concedes that, when such narrative reports were argued to be inadequate in other cases, the Court generally refused to intervene. However, he argues

that his case is different because (i) he was not interviewed in connection with the preparation of the report; (ii) no narrative report was produced; (iii) he is a Convention refugee; (iv) when drafting the report, the Minister believed he was in a position to effect removal immediately because there was no stay in place yet; (v) the Minister was of the opinion that the Immigration Appeal Division (the IAD) had no jurisdiction to hear an appeal where humanitarian and compassionate (H&C) grounds could be raised; (vi) there are numerous relevant consideration in the applicant's case that should have been taken into consideration.

[21] The applicant further submits that refugees are entitled to a higher level of procedural fairness than visitors (citing Justice Décary in *Cha*, above). He argues that, when Justice Mosley held in *Awed v Canada (Minister of Citizenship and Immigration)*, 2006 FC 469, 46 Admin LR (4th) 233 [*Awed*]) that this does not mean that refugees are entitled to expect more participation or discretion in the section 44 context than other foreign nationals, he was relying on the fact that refugees can appeal to the IAD where they can raise H&C considerations, a right the applicant may not have in this case.

[22] The applicant submits that the Federal Court jurisprudence on the topic is divergent, and the Federal Court of Appeal's decision in *Cha*, above, is ambiguous with regards to the existence of discretion.

Respondent's Position

[23] The respondent submits that the Officer's discretion not to issue a subsection 44(1) report when the individual has breached the relevant sections of the Act is limited. He cites *Correia v*

Canada (Minister of Citizenship and Immigration), 2004 FC 782, 253 FTR 153 [*Correia*] in support of the idea that the decision to make such reports must be considered in the context of Division 5 of the Act, which has as its purpose the removal of certain persons from Canada. He submits that the Officer's inquiry is restricted to relevant facts, and not H&C matters nor the applicant's rehabilitation. The respondent also refers to *Richter v Canada (Minister of Citizenship and Immigration)*, 2008 FC 806, [2009] 1 FCR 675, aff'd 2009 FCA 73, [2009] FCJ no 309 (QL) [*Richter*] to indicate that the discretion not to report is extremely limited and that the purpose of the interview under subsection 44(1) is merely to confirm the factual information that supports the opinion of the Officer.

[24] The respondent also relies on *Cha*, above, at paras 33, 35 and 37, where the Federal Court of Appeal held that an officer is expected to prepare a report under subsection 44(1) unless a pardon has been granted or the convictions reversed. Furthermore, it is argued that *Cha* stands for the notion that a reading of sections 36 and 44 of the Act indicates that officers and Minister's delegates are only on a fact-finding mission and are not to consider particular circumstances – it is not the officer's function to deal with H&C matters or other matters relevant to a Pre-removal risk assessment.

[25] The respondent submits that in the case of *AMM*, above, the Court did not answer whether there was a discretion or not on the part of the Officer to issue the report. The respondent further submits that even when there was no detailed assessment, the Court did not intervene.

[26] Finally, the respondent also submits that the applicant can present mitigating factors at the subsection 44(2) stage before the Minister's delegate (citing *Wajaras v Canada (Minister of Citizenship and Immigration)*, 2009 FC 200, [2009] FCJ No 269 (QL)).

Analysis

[27] At the outset, the Court recalls the wording of subsection 44(1) of the Act: "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". [Emphasis added]

[28] The wording indicates that a certain discretion is awarded to the Officer. Justice Décary's words in *Cha*, above, at para 19, indicated that the level of discretion an officer has will depend on whether the case deals with foreign nationals or permanent residents, the various possible grounds for inadmissibility (and the varying level of complexity of the underlying facts, depending on the grounds), and whether the Minister's delegate issues the deportation order him or herself or refers it to the Immigration Division instead (*Cha*, above, at para 22).

[29] At hearing before this Court, the applicant relied heavily on *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429 at para 31, [2006] 1 FCR 3 [*Hernandez*] which lends support to the applicant's contention that certain factors should have been considered for the subsection 44(1) report.

[30] In *Hernandez*, above, Justice Snider interpreted the judgment in *Correia*, above, not to mean that immigration officers were precluded from considering anything beyond the conviction itself, but rather that the facts considered must relate to the criminal conviction. Justice Snider concluded by analyzing the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193, and held that the duty of fairness in such cases was more relaxed, being administrative in nature, and did not always require an oral interview, but that at the very least, the applicant should be given the opportunity to make submissions and know the case against him.

[31] However, the Court notes that the remainder of the jurisprudence that was examined in *AMM*, above, generally favours the respondent's point of view that very little discretion is awarded to officers or Minister's delegates to consider factors other than the factual basis of the inadmissibility finding. In support for this proposition, the Court recalls the following excerpt from *Cha*, above, at para 37, where Justice Décary of the Federal Court of Appeal stated that the intent of Parliament is clear and observed the following:

> [37] It cannot be, in my view, that Parliament would have in sections 36 and 44 of the Act spent so much effort defining objective circumstances in which persons who commit certain well defined offences in Canada are to be removed, to then grant the immigration officer or the Minister's delegate the option to keep these persons in Canada for reasons other than those contemplated by the Act and the Regulations. It is not the function of the immigration officer, when deciding whether or not to prepare a report on inadmissibility based on paragraph 36(2)(a) grounds, or the function of the Minister's delegate when he acts on a report, to deal with matters described in sections 25 (H&C considerations) and 112 (Pre-Removal Assessment Risk) of the Act.
>
> [citations omitted]

[32] In the case of *Awed*, above, which concerned a foreign national who was also a Convention refugee, Justice Mosley held the following at paragraph 17 when applying the Federal Court of Appeal's judgment in *Cha*:

> [17] I find no support in *Cha* for the applicant's contention that foreign nationals who are also protected persons and who have been convicted of the predicate crimes described in section 36 of the Act, are entitled to a higher degree of procedural fairness or participatory rights with respect to the operation of subsection 44(1) than other foreign nationals or permanent residents.

[33] Hence, Justice Mosley viewed the interview under subsection 44(1) simply as a means to confirm the facts underlying the finding of inadmissibility with a minimal content of duty of fairness. Two (2) years later, in *Richter v Canada (Minister of Citizenship and Immigration)*, 2008 FC 806, [2009] 1 FCR 675, Justice Mosley reiterated his conclusions expressed in *Awed*, above. Justice Mosley's decision in *Richter* was appealed and the Federal Court of Appeal confirmed the decision and substantially adopted his reasoning and mentioned that the scope and content of the duty will vary depending on the circumstances of each case (*Richter v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 73 at para 10, [2009] FCJ No 309 (QL)).

[34] The Court is therefore of the view that the jurisprudence favours a more restrictive approach to the discretion that an officer or a Minister's delegate has in considering mitigating or H&C factors at the section 44 level (*Cha*, above; *Awed*, above; *Richter*, above; *Correia*, above).

[35] Based on the jurisprudence noted above and the circumstances of this case, the Court cannot conclude that the duty of fairness in a case like this one requires the Officer to allow for submissions prior to the issuance of a subsection 44(1) report, or that the Officer should, or even could, consider

humanitarian and compassionate grounds. The fact that the Minister's delegate would not consider H&C factors during this interview is consistent with the majority of the jurisprudence on this issue, and consistent with the Federal Court of Appeal's decisions. Therefore, the Court finds no breach in procedural fairness that warrants its intervention.

[36] The application for judicial review will therefore be dismissed.

[37] The applicant proposed the following three (3) alternative ways of formulating a question to be certified:

> (i) In the preparation of a report under subsection 44(1) of the Act in respect of a protected person, does the duty of procedural fairness require that the officer provide an opportunity for the person concerned to make submissions and/or provide evidence? or,
> (ii) What is the scope of discretion available to an enforcement officer in deciding whether to prepare, and in preparing, a subsection 44(1) report regarding a protected person? or,
> (iii) What is the duty of fairness owed to a protected person by an enforcement officer in deciding whether to prepare, and in preparing, a subsection 44(1) report?

[38] The Federal Court of Appeal stated the necessary criteria for certifying a question of general importance in *Canada (Minister of Citizenship and Immigration) v Liyanagamage* (FCA), [1994] FCJ No 1637 (QL), 176 NR 4. The proposed questions must transcend the interests of the immediate parties to the litigation, contemplate issues of broad significance or general application and be determinative of the appeal.

[39] In the Court's view, the questions formulated by the applicant do not satisfy these criteria: the proposed questions for certification have been considered or settled by the Federal Court of Appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No questions for certification;

3. A copy of the Reasons for Judgment and Judgment is to be placed in file IMM-2411-12.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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