Federal Court  Cour fédérale

Date: 20130305

Docket: IMM-9484-11

Citation: 2013 FC 231

Ottawa, Ontario, March 5, 2013

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ABDIMALIK OMAR

Applicant

and

CITIZENSHIP AND IMMIGRATION CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the determination of Sabine Daher, Delegate of the Minister [the Delegate], in which the Delegate decided on November 18, 2011 that Abdirmalik Abdi Omar [the Applicant] may be deported to Somalia despite subsection 115(1) of the *Immigration and Refugee Protection Act* [*IRPA*] since he constitutes a danger to the public in Canada and further his removal would not violate rights under section 7 of the *Canadian Charter of Rights and Freedoms* [the *Charter*].

[2] The Applicant submits the Delegate erred in coming to her determination with regard to the Applicant's likelihood of rehabilitation, the health consequences for the Applicant on removal, and the implications arising because of the Applicant's conversion to Christianity.

[3] I have determined that the Delegate's decision on each of these questions fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

[4] I would dismiss this application for the reasons that follow.

Background

[5] The Applicant is a 31 year old citizen of Somalia. His family is from the north-west region of Somalia known as Somaliland. He arrived in Canada at age 11, in 1992 with his mother and siblings. His family were determined to be Convention refugees in 1993. In 1999, the Applicant became a permanent resident of Canada. He has fathered two children in Canada.

[6] As a youth, the Applicant was convicted of 5 *Criminal Code* offences:

i. August 16, 1996	1. Break, Enter and Theft s. 348(1) CC, 36 days secure custody (time served) & 30 days open custody & probation 12 months
	2. Failure to Appear s.145(5) CC, 15 days open custody
ii. March 26, 1997	3. Assault s. 226 CC, 3 months open custody & probation 9 months
iii. December 15, 1997	4. Assault Causing Bodily Harm s. 267(b) CC, 3 months secure custody & probation 12 months

iv. March 25, 1998	5. Robbery s. 344 CC, 6 months secure custody & 6 months open custody & probation 12 months

[7] As an adult, he was convicted of 21 *Criminal Code* offences:

i. March 19, 2001	1. Fail to comply with conditions of undertaking given by officer in charge s. 145(5.1) CC, $150 fine and surcharge
ii. July 29, 2003	2. Assault with a weapon s. 267(a) CC, 3 months & 33 days pre-sentence custody
	3. Fail to comply with probation order s. 733.1 CC, 1 month
	4. Fail to comply with probation order s. 733.1 CC, 1 month
iii. October 19, 2005	5. Fail to comply with recognizance s.145(3) CC, 30 days & 12 days pre-sentence custody
	6. Fail to comply with recognizance s. 145(3) CC, 30 days
iv. November 3, 2006	7. Mischief under $5,000 s. 430(4) CC, 15 days
	8. Mischief under $5,000 s. 430(4) CC, suspended sentence & probation 1 day
v. December 21, 2006	9. Break Enter and Commit s. 348(1) CC, 22 days & 79 days pre-sentence custody & probation 2 years
	10. Fail to comply with recognizance's s. 145(3) CC
	11. Assault s. 266 CC, 22 days & 2 years probation for (2) & (3)
vi. January 18, 2007	12. Escape lawful custody s. 145(1)(a) CC, suspended sentence & probation 1 day
	13. Possession of a schedule II substance s. 4(1) *Controlled Drugs and Substances Act*, suspended sentence & probation 1 day
vii. March 7, 2007	14. Uttering Threats s. 264.1(1)(a) CC, 3 months jail plus 65 days credit pre-trial custody
	15. Possession of a Weapon s. 88(1) CC, 2 months jail
	16. Assault s. 266 CC, 2 months jail
	17. Fail to comply with recognizance s. 145(3) CC, 1 month
	18. Criminal Harassment s. 264(3)(a) CC, 1 month
	19. Fail to comply with recognizance s. 145(3) CC, 1 month
	20. Uttering Threats s. 264.1(1)(a) CC, 3 months conditional sentence order concurrent
	21. Uttering Threats s. 264.1(1)(a) CC, 2 months conditional sentence order concurrent

[8] On January 22, 2007, following his convictions, the Applicant became subject of an inadmissibility report under s. 44 of the *Act* for serious criminality. On March 22, 2007, the Applicant became the subject of a second inadmissibility report under s. 44 of the *Act*.

[9] On June 4, 2007, Canada Border Services Agency (CBSA) issued an immigration warrant against the Applicant for an Admissibility Hearing. The Applicant was found inadmissible for serious criminality, pursuant to s. 36(1)(a) of the *Act*. A Deportation Order was issued against him, and he was detained on June 11, 2007.

[10] The Applicant remained detained until January 7, 2008 when he was released on the condition that he attend the Anchorage Addiction Treatment Program. On June 12, 2008, the Applicant graduated from the Anchorage Program and was released from immigration conditions.

[11] On March 30, 2009, CBSA submitted a Danger Opinion package to the National Headquarters of Citizenship and Immigration Canada.

[12] In September of 2010, the Applicant incurred charges by the Ontario Provincial Police. He was acquitted of these charges on February 1, 2011, and they do not constitute part of his criminal record. On February 8, 2011, CBSA executed an immigration warrant during the detention review because the Applicant had breached conditions of his release. The detention was maintained on the grounds that he posed a danger to the Canadian public and that he was a flight risk.

[13] On March 11, 2011, at a detention review, the Applicant's counsel proposed that the Applicant attend at the Anchorage Addiction Treatment Program again, but this was denied. On April 8, 2011, an Immigration Appeal Division member allowed for the Applicant to be released from detention to attend at the Christian residential treatment program called the Jericho Road Addiction Treatment Program. The Applicant entered the Jericho Road program where he participated in the program including attending Christian church services and studying the Bible.

[14] On November 18, 2011, the Delegate issued her Danger Opinion.

Decision Under Review

[15] The Delegate issued a Danger Opinion pursuant to s. 115(2)(a) of the *Act*. The Delegate considered the Applicant's overall criminal record, his prospects for rehabilitation, and the risk he poses to Canadian society. She concluded that the Applicant constitutes a danger to the Canadian public.

[16] The Delegate began with a review of the legislation and case law on which her Danger Opinion rests. She canvassed the relevant legislation and also relied on *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 for compliance with section 7 of the *Charter*.

[17] The Delegate stated that pursuant to s. 115(2)(a) of the *Act*, she had to assess whether the Applicant constitutes a present or future danger to the public of Canada. She examined his

particular circumstances to determine whether he is a potential re-offender whose presence in Canada poses an unacceptable risk to the public.

[18] She summarized the Applicant's immigration file, his criminal record, and the chronology of events. She reviewed court documents and Ottawa Police Service records and reviewed details of the Applicant's criminal acts. The Delegate followed with a danger assessment which was the foundation of her inadmissibility decision.

[19] She found that the Applicant had a propensity to violence and he was involved in gang activities such as swarming and robberies, he threatened his ex-girlfriend and family with death and had been in possession of crack cocaine. The Delegate found that the Applicant's crimes had escalated through the years, and he was constantly breaching court orders.

[20] The Delegate also noted that after the Applicant's last detention, he participated in a treatment program at the Jericho Road Addiction Treatment Program as a condition of his release.

[21] The Delegate considered evidence from Dr. Philip Chiefetz, who treated the Applicant for substance abuse problems. Dr. Chiefetz wrote in 2008 that the Applicant had a good prognosis for full recovery from substance abuse disorder and major depression. The Delegate noted that in 2011, Dr. Chiefetz found that the Applicant had a poor prognosis for a full recovery from Post-Traumatic Stress Disorder and depression "unless he is able to work out his feelings about the trauma early in his life and he is able to return to full and constructive function."

[22] The Delegate found that the Applicant did not demonstrate a complete divorce with his past activities. She considered the Applicant's relapse into substance abuse since his 2008 detention. The Delegate noted that substance abuse had contributed to his criminal activity. Given the connection between the Applicant's problem with substance abuse and his criminal activity, the Delegate found that the Applicant was not rehabilitated.

[23] The Delegate then considered the Applicant's claims that he will face persecution based on the country situation in Somalia, the Applicant's tribal ancestry, no family in Somalia to protect him, inadequate mental health and medical support, and the fact that he is a Christian.

[24] The Delegate, after reviewing these submissions relating to the potential for persecution, found that the Somaliland region of Somalia is a relatively peaceful and democratic area. While acknowledging that human rights violations do occur in Somalia, the Delegate found that the Applicant would not be at any more risk than the general public in the region.

[25] With respect to his tribal ancestry, the Delegate found that the Applicant was a member of the Gadabursi clan, a sub-clan of the Dir clan, which has peaceful relations with the governing clan in Somaliland and his tribal affiliation would not subject him to persecution. The Delegate found that his tribal affiliation would allow him to find clan protection with the Dir clan in either Somaliland or in the south-central region of Somalia, where the Dir also reside.

[26] The Delegate found that the medical treatment he would receive in Somaliland would be unlikely to be at the same level as the care available to him in Canada. However, these

difficulties are the same as those faced by the general public in Somalia. Moreover, the Delegate found the lack of specific information with regard to the Applicant's condition meant one could not assume what may happen if the Applicant does not find adequate medical attention on return to Somalia.

[27] The Delegate found that the Applicant's attendance at the Jericho Road faith-based rehabilitation centre was for his rehabilitation and not because of a change in religious faith. She noted that the Applicant did not produce any baptism certificate or other substantive documentation which would attest to his conversion to his Christianity. The Delegate continued on to assess whether Christians in Somaliland are persecuted, and found that they are not. Coupling this with the limited documentation about the Applicant's Christian beliefs, the Delegate found that the Applicant would not be personally subjected to persecution on grounds of religion in Somaliland.

[28] The Delegate's conclusion was that there was no evidence that the Applicant would be personally at risk of persecution upon return to Somalia or Somaliland. The Applicant's risk, if he was returned to Somalia or Somaliland, would not be any more than the risk to the general public in that region.

[29] The Delegate found the minimal risk the Applicant would face in Somalia or Somaliland is greatly outweighed by the dangerousness he poses for the Canadian public.

[30] The Delegate then considered the humanitarian and compassionate considerations and conducted a best interests of the child analysis. She found that the Applicant did not adequately establish his presence in his children's lives to support a claim that his removal to Somalia would be against the best interests of his children.

[31] The Delegate concluded by deciding that the Applicant represents such a danger to Canadian society that he should be deported, notwithstanding any risk he might face upon return to Somalia.

Relevant Legislation

[32] Sections 36 & 115 of *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 state, in part:

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed; …	36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants : a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé; …
115. (1) A protected person or a person who is recognized as	115. (1) Ne peut être renvoyée dans un pays où elle risque la

a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.
(2) Subsection (1) does not apply in the case of a person	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
(*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or	*a*) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
(*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.	*b*) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

Standard of Review

[33] The standard of review that applies to the assessment of fact and law and fact is reasonableness. *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] This Court has determined that the standard of review of a Delegate's danger opinion is that of reasonableness. *Alkhali v Canada (Minister of Citizenship and Immigration)*, 2011 FC 976 [*Alkhali*]

Issue

[34] Both Applicant and Respondent submit that the issue is whether the Delegate's decision that the Applicant poses a danger to the public and that he should be removed pursuant to s. 115(a) of the *IRPA* was reasonable.

[35] I agree the issue is whether the Delegate's determination is reasonable or not.

Analysis

[36] More specifically, three points arise under the reasonableness analysis. First, did the Delegate err when in not giving more weight to the fact that the Applicant had been free of criminal convictions for five years? Second, did the Delegate err in interpreting the Dr. Chiefetz 2008 and 2011 medical reports? Third, did the Delegate err in assessment of the risk that the Applicant would face upon his return to Somalia due to his tribal affiliation, health, or religion?

Did the Delegate ignore passage of time since the last criminal convictions?

[37] The passage of time since criminal convictions alone is insufficient to determine the risk posed to the Canadian public. *Fabian v Canada (Minister of Citizenship and Immigration)*, 2006 FC 851 at para 48. If a delegate transparently and reasonably gives reasons for the danger opinion, even though an applicant has not been convicted in several years, the opinion may withstand judicial scrutiny.

[38] The Delegate assessed the nature of the Applicant's crimes, noting that the Applicant was convicted of assault causing bodily harm under subsection 267(b) of the *Criminal Code* which carries a maximum term of imprisonment of at least ten years and falls within the section 36 of *IRPA* definition of "serious criminality". The Delegate also considered the violent circumstances surrounding a number or the Applicant's criminal convictions and took note of a trend to increasing violence.

[39] The Delegate was concerned with the Applicant's possession of crack cocaine in 2006. She noted the connection between his criminal activities and his problems with substance abuse. The Delegate considered his relapse which followed the first treatment program and the most recent medical prognosis provided in the second medical report. She decided that the Applicant's substance abuse remains an issue.

[40] The Delegate acknowledged that it had been five years since the Applicant's last criminal conviction. She also noted, however, that he had spent much of the intervening time in detention.

[41] Given the Delegate considered not only the passage of time of the Applicant's last criminal offences but also related factual evidence, I find the Delegate's assessment the Applicant remains a risk to the Canadian public reasonably comes within a range of possible outcomes. *Dunsmuir*.

Did the Delegate err in finding that the Applicant's prognosis for full recovery had gone from "good" to "poor"?

[42] The Delegate examined the documentary evidence from Dr. Chiefetz, which included a "good" prognosis for full recovery in 2008 and a later "poor" prognosis for full recovery in 2011.

[43] The first psychiatric report by Dr. Chiefetz consists of an email enclosing a Health Status Report. The email reported the Applicant's prognosis for recovery from substance abuse disorder with major depression was good. It is to be noted that the conditions described in the Health Status Report listed the Applicant's mental health diagnosis as substance abuse, depression and post traumatic stress disorder. Subsequently, in 2011, Dr. Chiefetz reported the Applicant's prognosis for recovery from post traumatic stress disorder was poor.

[44] Given the above two reports were from the same treating psychiatrist and both diagnosed post traumatic stress disorder, it was reasonable for the Delegate to conclude that the Applicant's mental health condition had deteriorated.

Did the Delegate err in finding that the Applicant would not face an individualized risk of persecution or harm due to his tribal affiliation, his mental health or religion if he were refouled to Somalia?

[45] The Applicant claims he would be persecuted or suffer harm on several grounds should he be removed to Somalia being his tribal affiliation, his need for mental health treatment, and his religion.

[46] The Delegate considered that the Applicant's tribal affiliation might instead afford him some degree of protection in either Somaliland or the south-central region of the country. She examined the tribal relations as they exist in Somalia, and transparently found that the Applicant faced no particularized risk as a member of the Gadabursi clan given his clan had peaceful relations with the governing clan in Somaliland. Any risk arising from recent security issues was a risk faced by the general population and would not be particularized to the Applicant.

[47] The Delegate found the evidence was wanting in regards to what consequences would arise for the Applicant if he could not access the psychiatric medications and treatment he received in Canada.

[48] The Delegate considered the condition of mental health services and patient experiences in Somalia. While the state of mental health services in Somalia is among the worst in the world, the Delegate found there is no reason to believe that the Applicant would face particularized risk if he were to return. Rather, the Applicant might face risk, but that this risk is no greater than other Somali mental health patients.

[49] In response to the Applicant's claim of a newfound faith in Christianity, the Delegate explained why she questioned his conversion. While several individuals testified that the Applicant was genuinely practising Christianity, the Delegate balanced these testimonies against the near absence of other supporting evidence.

[50] The Delegate acknowledged the Applicant was attending a faith-based treatment program, but she found that his attendance was more for his substance abuse issues than his religious beliefs. Finally, she found there were Christians in Somaliland who kept a low profile. Since the Applicant wasn't active in proselytizing Christianity, he would not likely face persecution as a Christian in Somalia.

[51] The Applicant supplied letters indicating that the Applicant had converted to Christianity. However, I agree with my colleague Justice Pinard who said that "it would be absurd" to allow an application for judicial review to succeed simply because an Applicant provided a letter attesting to his newfound faith. *Jin v Canada (Minister of Citizenship and Immigration*), 2012 FC 595. It was reasonable for the Delegate to give this evidence of conversion little weight in the present case given the Applicant's limited indicia of Christian practice and the absence of reference to his Christian belief by others closest to the Applicant. In any event, the Delegate did consider the likelihood of persecution the Applicant might face as a Christian in Somaliland and found it at a lower level of risk.

[52] I consider it was reasonable for the Delegate to find that the Applicant's conversion to Christianity would not put him at risk of persecution should he be refouled to Somalia.

[53] In my view, the Delegate's determination that the Applicant does pose a danger to the Canadian public and the risks he may face on refoulment to Somalia or Somaliland did not offend section 7 of the *Charter*.

[54] The Parties have not proposed a question of general importance for certification.

Conclusion

[55] The Delegate reasonably assessed whether the Applicant represents a present or future risk to the Canadian public. The Delegate considered the evidence, identified the facts upon which she relied and set out reasons for her conclusions. She reasonably balanced the risk he poses to the Canadian public against the risks he faces should he be refouled to Somalia. Her Danger Opinion transparently and reasonably outlines why she decided he constitutes a danger to the public in Canada.

[56] I would not disturb the Delegate's Opinion.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No question of general importance is certified.

"Leonard S. Mandamin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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