Federal Court  Cour fédérale

Date: 20150526

Dockets: IMM-1561-14
IMM-7620-14

Citation: 2015 FC 681

Ottawa, Ontario, May 26, 2015

PRESENT: The Honourable Mr. Justice Zinn

Docket: IMM-1561-14

BETWEEN:

GEORGE SIDAMONIDZE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Docket: IMM-7620-14

AND BETWEEN:

GIGA ODOSASHVILI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] These applications were heard together as each raises a common issue of law and in each the material facts are common to each applicant. A copy of these reasons is to be filed in IMM-7620-14.

[2] Each applicant, a permanent resident in Canada, submits that he was denied procedural fairness when he was refused the opportunity to cross-examine the enforcement officer who prepared a report dated February 12, 2014, under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [the Act], opining that there are reasonable grounds to believe that the applicant is inadmissible to Canada pursuant to paragraph 37(1)(a) of the Act (organized criminality).

[3] Officer Clare authored a statutory declaration on February 15, 2014, relating to the applicants and a number of other individuals who had been under investigation by Canada Border Services Agency and the York Regional Police. It has been filed by the Minister in a number of proceedings. Officer Clare attests that these "individuals represent only a small fraction of the individuals who comprise the Georgian criminal organization operating in the Greater Toronto Area." He concludes: "I have ample reason to believe that the above noted individuals are members and/or leaders of this criminal organization, and I am able to comfortably conclude that they are in the very least, associated to the criminal organization and it's [sic] many other members."

[4] Officer Clare's February 15, 2014 affidavit was the subject of the court's scrutiny in an earlier judicial review proceeding brought by Giga Odosashvili regarding a decision of the Immigration Division not to release him from detention: *Odosashvili v Canada (Minister of Citizenship and Immigration)*, 2014 FC 308. It was held that it was improper for Minister's counsel to have relied on Officer Clare's affidavit as it contained at least one false statement.

> Exhibit DR-1 filed by the Minister contained a statement that was known or ought to have been known to be false. The February 15, 2014, statutory declaration of Officer Mark Clare states that Malkhaz Tsiklauri and Giorgi Tchintcharauli were charged with break and enter and had been identified as two of the four leaders of the "Break and Enter Ring." However, all of the criminal charges against those two men were withdrawn by the Crown ten months earlier on April 24, 2013. With that withdrawal, the charges ceased to exist. An affidavit from their criminal counsel attests that the withdrawal was unconditional. Criminal counsel further attests that neither was ever charged with any organized crime related offence.

[5] The record indicates that Officer Clare's February 15, 2014 declaration has subsequently been struck from the record or given no weight in three subsequent detention review hearings conducted by the Immigration Division.

[6] Officer Clare, after authoring the subsection 44(1) reports went on leave and the files were taken over by Officer Fieldhouse. Before referring the reports to the Minister's Delegate, Officer Fieldhouse offered the applicants the opportunity to make written submissions. The applicants subsequently made a request to cross-examine Officer Clare, which was denied.

[7] The applicants made another request to cross-examine Officer Clare and again, the requests to cross-examine were denied, Officer Fieldhouse writing as follows:

> It seems you may be confused about my role in this process. Allow me to explain. I am not the minister's delegate. I simply make the recommendation to the minister's delegate whether or not to refer the case to admissibility hearing. The decision to send the case to hearing is made by the minister's delegate.
>
> I am unable to provide you with my recommendations regarding this case as I am yet to form my recommendation. Submissions for [*sic*] your client will be considered during my formation of the recommendation. As such, please provide me with your submissions by this Friday, as per my previous fax. Failure to do so will result in me forming my recommendation in the absence of submissions from your client.
>
> As I indicated previously, your request to "cross examine" Officer Clare will not be granted. I will consider your submissions before making my recommendation to the minister's delegate.

[8] The applicants did not make any submissions to Officer Fieldhouse. On March 18, 2014, Officer Fieldhouse referred the report to the Minister's Delegate. On that same day, the Minister's Delegate referred the applicants' cases to the Immigration Division for an admissibility hearing.

[9] The parties are in agreement, as is the court, that the question raised in the application, being a question of procedural fairness, is to be reviewed on the standard of correctness.

[10] The admissibility process as it relates to these applicants on these facts consists of the following steps:

1. Pursuant to subsection 44(1) of the Act, an officer who is of the opinion that a permanent resident in Canada, is inadmissible may prepare a report setting out the relevant facts and transmit the report to a Minister's Delegate;

2. If the Minister's Delegate is of the opinion that the subsection 44(1) report is well founded he or she may refer the report to the Immigration Division for an admissibility hearing; and

3. At the Immigration Division, where the person alleged to be inadmissible is a permanent resident, the Minister of Public Safety and Emergency Preparedness bears the burden of proving that the person is inadmissible on the balance of probabilities.

[11] The applicants assert that the question raised – the right to cross-examine an officer, who writes a subsection 44(1) report, is novel. There is no jurisprudence on this precise question; however, the case law on the extent of procedural fairness under section 44 of the Act is well settled and favours the respondent's position.

[12] This court has held, as the respondent submits, that "a relatively low level of procedural fairness is owed when the initial s. 44.(1) report is being prepared:" *Leong v Canada (Solicitor General)*, 2004 FC 1126 at para 13. In *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429 [*Hernandez*] at paras 70-72, this was described as "a more relaxed duty of fairness:"

> Balancing all of these factors, I find that they point toward a more relaxed duty of fairness, similar to that found by the Supreme Court in *Baker*. In my view, the duty of fairness implicitly adopted by CIC for purposes of the s. 44(1) report is appropriate. Although these are administrative decisions (rather than quasi-judicial) and although the person affected has some other rights to seek to remain in Canada, these are serious decisions affecting his rights. CIC, whose choice of procedures should be respected, has elected to give the affected person a right to make submissions, either orally or in writing and to obtain a copy of the report. Having a copy of the report would allow the affected person to decide whether he wishes to seek judicial review of the immigration

> officer's report to this Court. This, I conclude is the duty of fairness owed the Applicant and others in his position with respect to the Officer's Report.
>
> Implicit in this duty is, in my view, a requirement that the person being interviewed by an immigration officer is informed of the purpose of that interview so that he may make meaningful submissions. Further, I would think that the duty of fairness would require the immigration officer put to the interviewee any information he has that the interviewee would not reasonably be expected to have. A further implication is that the person should be offered the opportunity to have counsel present at any interview or to assist him in preparing written submissions. All of this is part of what CIC has acknowledged is required for the person to "fully understand both the case against them and the nature and purpose of the report".
>
> Given my conclusion that the duty of fairness is "relaxed", there are a number of procedures that are not essential. As was concluded in *Baker*, I would agree that an oral interview by the immigration officer is not always required, as long as the affected person is given an opportunity to make submissions and to know the case against him. Nor do I believe that the duty requires that the Officer's Report be put to the Applicant for a further opportunity to respond prior to the s. 44(2) Referral.

[13] Given this low or relaxed duty of fairness, it is difficult to see why a person subject to a subsection 44(1) report would be entitled to cross-examine the officer who wrote the report or provided a statutory declaration setting out the basis for the officer's belief that the person was inadmissible to Canada. This is particularly the case when, as here, this is but the first step in a process that may lead to a full hearing before the Immigration Division at which the Minister bears the burden of proof.

[14] The applicants rely on this court's decision in *Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 176 [*Nagalingam*], which held that it was a breach of procedural fairness to deny Mr. Nagalingam the right to cross-examine an officer before a

Minister's Delegate rendered a decision under subsection 115(2)(b) of the Act. However, subsection 115(2)(b) is materially different than subsections 44(1) and 44(2) because under subsection 115(2)(b) the officer is rendering a decision on removal, which engages the *Charter* concerns of life, liberty and security of the person: *Nagalingam* at para 165. In contrast, subsections 44(1) and 44(2) are not final decisions, and what is at stake is whether the case will be referred to an admissibility hearing.

[15] The applicants submit that they wanted the opportunity to cross-examine Officer Clare on his statutory declaration because they "knew that statements contained within Officer Clare's presumably credible statutory declaration were misleading" and that certain statements he made were untrue as was found by this court.

[16] In my view, the opportunity at this early stage in a possible admissibility process to respond with written submission accomplishes both of the applicants' stated objectives. The untruthful statement cannot be challenged by the Minister as it is contained in a court decision. If there are other statements of a similar quality, the applicants are at liberty in making submissions to indicate those. As Officer Fieldhouse noted, the applicants will have every opportunity to test the Crown's evidence at an admissibility hearing before the Immigration Division.

[17] The applicants also raised an argument in written submissions that the reasons were inadequate "because it makes it impossible to understand why misleading statements provided by Officer Clare do not need to be tested." This submission is without merit. The decision never

says that any statement does not need to be tested; rather the decision states, accurately, that at this stage the process is an administrative one and that the applicants will have every opportunity to test the evidence when the process becomes quasi-judicial at the Immigration Division level.

[18] The applicants proposed the following question be certified as a question of general importance that would be dispositive of these applications:

> In the context of immigration prosecutions under section 37(1)(a) of the *IRPA*, what is the scope of:
>
> (1) the enforcement officer's discretion under section 44(1) of *IRPA* in making a decision as to whether to allow the cross-examination on the statutory declaration sworn in support of the section 44 report; and
>
> (2) the immigration officer's (including the Minister's delegate) discretion under section 44(2) of *IRPA* in making a decision as to whether to allow the cross examination on the statutory declaration which the enforcement officer swore in support of the section 44 report, prior to making his or her decision as to whether to make referral to the Immigration Division for the admissibility hearing?

[19] The respondent opposes certification of these questions or any question.

[20] I agree with the respondent that the questions as framed cannot be certified. The first deals with an officer's discretion to permit cross-examination – this was not an issue in these applications. The second deals with the process before the Minister's Delegate – this too was not an issue in these applications.

[21] I am of the view that it is well-established in this court and the Federal Court of Appeal that the decision an officer makes under subsection 44(1) is administrative and lies at the low end

of the procedural justice scale. It was observed in *Hernandez* and others that followed it that the right to procedural justice entails only the opportunity to make submissions and know the case made against the subject of the report. Accordingly, the proposed question, even if framed properly is not of general importance because, in my assessment, the law is well-settled.

JUDGMENT

THIS COURT'S JUDGMENT is that these applications are dismissed and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1561-14
STYLE OF CAUSE:	GEORGE SIDAMONIDZE v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
DOCKET:	IMM-7620-14
STYLE OF CAUSE:	GIGA ODOSASHVILI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 5, 2015
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DATED:	MAY 26, 2015

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