Federal Court  Cour fédérale

Date: 20160516

Docket: IMM-1913-15

Citation: 2016 FC 545

Toronto, Ontario, May 16, 2016

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

RAJ KAMAL CLARE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr Raj Kamal Clare, a citizen of India, obtained landed immigrant status in Canada in 2004. Soon thereafter, he was arrested in the United States in connection with a drug smuggling operation. In 2011, he was convicted in the US of conspiracy to import marijuana. After serving his sentence of two years, he was deported to India.

[2] Mr Clare returned to Canada in 2014. He was the subject of a report issued under s 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] (see Annex for provisions cited). The report found him inadmissible to Canada for serious criminality, according to s 36(1)(*b*) of IRPA, citing his US conviction for conspiracy to import drugs. It concluded that the US offence equated to the offence of importing and exporting a controlled substance under s 6(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA], punishable by a maximum sentence of life in prison.

[3] Based on the report, the Minister referred the matter to the Immigration Division [ID], under s 44(2) of IRPA, for a hearing on the issue of his inadmissibility to Canada. Before the hearing took place, Mr Clare received a Notice of Amendment to the report. The revised version replaced the reference to s 6(1) of the CDSA with a reference to s 465(1)(*c*) of the *Criminal Code*, RSC 1985, c C-46, a provision that imposes liability on a person who is part of a conspiracy to commit a crime. The revised version did not set out the underlying crime, but the Notice did state that the change did not affect the substance of the report and that a fresh referral to the ID was unnecessary.

[4] At the ID hearing, the amended report was presented to Mr Clare, and his counsel stated that he was prepared to proceed with the hearing. However, Mr Clare filed a preliminary motion arguing that the s 44(2) referral was defective because it wrongly cited s 36(1)(*a*) of IRPA, rather than the appropriate s 36(1)(*b*). The ID found that the error was merely typographical and that it did not affect the validity of the referral.

[5] Mr Clare also argued that the s 44(1) report itself was defective because it merely cited a general provision relating to liability for conspiracy, and failed to identify the nature of the alleged conspiracy. The ID found that the report should have included a reference both to s 6(1) of the CDSA and s 465(1) of the *Criminal Code* in order to identify properly the equivalent Canadian offence. However, it found that the error was not fatal given the overall context. In addition, it found that the amendment did not amount to a breach of natural justice.

[6] Mr Clare challenges those findings in this judicial review. He asks me to quash the ID's decision to issue a deportation order against him, and to order another panel to reconsider his case.

[7] I can find no basis for overturning the ID's decision and will, therefore, dismiss this application for judicial review. The ID's reliance on the amended report was not unreasonable, and it did not cause any unfairness to Mr Clare.

[8] There are two issues:

1. Was the ID's reliance on the amended report unreasonable?
2. Did the ID breach principles of natural justice by admitting the amended report?

II. Issue One - Was the ID's reliance on the amended report unreasonable?

[9] The Minister raises a preliminary issue with regards to the application, arguing that Mr Clare is attempting an impermissible collateral attack on the Minister's decisions through this application for judicial review of the ID's decision. According to the Minister, in order to

question the propriety of the s 44(1) report and the s 44(2) referral, Mr Clare had to seek judicial review of both of those decisions separately and in addition to this application. The Minister points to the decision of this Court in *Collins v Canada (Minister of Citizenship and Immigration)*, 2009 CanLII 16327 (FC) at pp 2-3 where Hansen J stated, in *obiter*, that the applicant in that case was attempting an indirect attack on the validity of the report through a judicial review of the ID's decision.

[10] I disagree. While it was open to Mr Clare to seek judicial review of those other decisions, it was not necessary to do so in order to challenge the ID's decision on inadmissibility. The Court can assess the reasonableness of that decision with reference to the antecedent events – the s 44(1) report and the s 44(2) referral – without necessarily having before it separate challenges to those decisions. In some cases, applicants have challenged multiple decisions through separate applications, but I do not interpret them as requiring applicants to do so in order to challenge the ID's decision on inadmissibility (*eg*, *Hernandez v Canada*, 2007 FC 725). Further, while the Court in *Collins* concluded that the applicant in that case should have brought a separate application to challenge the report and referral, I find that, in the circumstances before me, it was not necessary for the applicant to do so.

[11] Mr Clare submits that the ID erred by relying on the amended report because its jurisdiction arises from a valid referral from the Minister based on a s 44(1) report. Here, however, there was no referral from the Minister based the amended report, only the original referral which contained a different description of the alleged Canadian equivalent offence. The

Minister was not given an opportunity to decide whether to refer the matter to the ID based on the revised report. Therefore, Mr Clare says, the ID unreasonably relied on the amended report.

[12] I disagree.

[13] When a s 44(1) report is amended, it need not be submitted to the Minister for a fresh determination on a referral to the ID, so long as the amendment conforms generally to the description of the alleged illegal conduct in the original report and identifies an offence that is punishable by a maximum of at least 10 years' imprisonment (*Uppal v Canada (Minister of Citizenship and Immigration)*, 2006 FC 338 at para 45). The question is whether the amendment is so significant that it requires a fresh consideration by the Minister about whether to refer the question of inadmissibility to the ID. In my view, looking at the amendment in context, there could have been no confusion about the basis of the inadmissibility allegation.

[14] Mr Clare was convicted in the US of conspiracy to import drugs. The original s 44(1) report referred to the Canadian offence of importing or exporting drugs while the amended report referred to liability for conspiracy. There can be no doubt that the alleged conspiracy referred to in the amended report was a conspiracy to import narcotics. The report itself stated that the amendment did not represent a change in the substance of the original report. In the circumstances, the ID reasonably relied on the amended report because there was no substantive change in the description of the offence on which it was based. I agree with the ID that it would have been preferable if the amendment had not erased the reference to s 6(1) of the CDSA but, in

the circumstances, there could have been no confusion about the basis of the inadmissibility allegation.

III. Issue Two - Did the ID breach principles of natural justice by admitting the amended report?

[15] Mr Clare maintains that a person in his circumstances is entitled to be informed of the specific offence on which an allegation of inadmissibility is based so that he or she can make an informed response to it. Here, Mr Clare submits, the amended report cited a different basis for liability from the original and failed to specify the underlying offence supporting the allegation of criminal conspiracy.

[16] In my view, Mr Clare was treated fairly. He and his counsel were made aware of the amendment to the report at the outset of the hearing and they agreed to proceed. In addition, through counsel, Mr Clare presented the ID with his objections to the amendment, and the ID responded to them.

[17] In short, Mr Clare was put on notice of the allegations against him, including the substance of the s 44(1) report and the Minister's referral, and he was given a reasonable opportunity to address them. He received fair treatment.

IV. Conclusion and Disposition

[18] In my view, the ID reasonably concluded that Mr Clare was inadmissible to Canada based on the amended s 44(1) report and the s 44(2) referral. Further, the ID treated him fairly by

providing him with notice and an opportunity to make submissions on the amended report. Therefore, I must dismiss this application for judicial review. No question of general importance arises.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"James W. O'Reilly"
Judge

Annex

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27
Serious criminality	Grande criminalité
36. (1) 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 :
(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
Report on Inadmissibility	Constat de l'interdiction de territoire
Preparation of report	Rapport d'interdiction de territoire
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.
Referral or removal order	Suivi
(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	(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

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.

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.

Controlled Drugs and Substances Act, SC 1996, c 19

Loi réglementant certaines drogues et autres substances, LC 1996, ch 19

Importing and exporting

6. (1) Except as authorized under the regulations, no person shall import into Canada or export from Canada a substance included in Schedule I, II, III, IV, V or VI.

Importation et exportation

6. (1) Sauf dans les cas autorisés aux termes des règlements, l'importation et l'exportation de toute substance inscrite à l'une ou l'autre des annexes I à VI sont interdites.

Criminal Code, RSC 1985, c C-46

Code criminel, LRC (1985), ch C-46

Conspiracy

465. (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:

Complot

465. (1) Sauf disposition expressément contraire de la loi, les dispositions suivantes s'appliquent à l'égard des complots :

…

[…]

(c) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a) or (b) is guilty of an indictable offence and liable to the same punishment as that to which an accused who is

c) quiconque complote avec quelqu'un de commettre un acte criminel que ne vise pas l'alinéa a) ou b) est coupable d'un acte criminel et passible de la même peine que celle dont serait passible, sur déclaration de culpabilité,

guilty of that offence would, on conviction, be liable;	un prévenu coupable de cette infraction;

FEDERAL COURT

SOLICITORS OF RECORD

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