

Federal Court



Cour fédérale

Date: 20161102

Docket: IMM-1325-16

Citation: 2016 FC 1214

Ottawa, Ontario, November 2, 2016

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

HARDEEP SINGH BRAR

Applicant

And

**THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

[1] Hardeep Singh Brar is a permanent resident of Canada. After he was convicted of conspiracy to distribute cocaine in the United States, a Minister's Delegate referred Mr. Brar to an admissibility hearing to determine whether he was inadmissible to Canada for serious criminality, as well as organized criminality and involvement in transnational crime.

[2] Mr. Brar seeks judicial review of the referral decision, asserting that it was unreasonable as it contained serious factual errors, and failed to consider important evidence. Mr. Brar further

submits that the Minister's Delegate failed to properly take "*Charter* values" into account in deciding whether to refer him to an admissibility hearing.

[3] For the reasons that follow, I am not persuaded that the Minister's Delegate erred as alleged. I am further satisfied that the decision to refer Mr. Brar to an admissibility hearing was entirely reasonable. Consequently, his application for judicial review will be dismissed.

I. Background

[4] Mr. Brar is a citizen of India who came to Canada in 1998 when he was 15 years old.

[5] In 2009, Mr. Brar agreed to take a rental car from Canada to the United States and to drop it off there for use by a drug courier. After meeting with the drug courier in the United States, Mr. Brar was arrested and charged with being part of a conspiracy to distribute 15 kilograms of cocaine, which was intended to be shipped to Canada.

[6] Mr. Brar expressed remorse for his actions, and he co-operated with US law enforcement during the investigation and prosecution processes. Mr. Brar evidently told investigators about others involved in the drug trafficking scheme, which led to the indictment of two other individuals.

[7] Mr. Brar subsequently pled guilty to the conspiracy offence. He was deemed by the prosecution to have accepted responsibility for his actions, and he was sentenced to 24 months in prison. After serving 21 months of his sentence, Mr. Brar was deported to India. He returned to Canada a month later, admitting to his criminal conviction when he was interviewed by a Canada Border Services Agency (CBSA) Officer at the Vancouver International Airport.

[8] Mr. Brar was subsequently given notice that reports may be prepared declaring him to be inadmissible to Canada for serious criminality, organized criminality and transnational crime. He was then interviewed by a CBSA Inland Enforcement Officer, and was given the opportunity to provide written submissions to the Officer prior to a decision being made as to whether to refer him for an admissibility hearing. In support of his request not to be referred to an admissibility hearing, Mr. Brar and his counsel provided the Officer with several sets of submissions and supporting materials over a three and a half year period.

[9] Among other things, Mr. Brar submitted that even though his offence was serious, it had not involved violence or firearms. Several years had passed since his one criminal offence, and he had not engaged in any further criminal activity. A psychologist's report provided by Mr. Brar had, moreover, indicated that he posed a low risk of re-offending. Mr. Brar also noted that he had come to Canada as a child, that he had lived in Canada for many years, and that he had minimal ties to India. All of Mr. Brar's immediate family, including his wife, were in Canada, and he was gainfully employed.

[10] An initial decision to refer Mr. Brar to an admissibility hearing was set aside on consent, after he sought judicial review of that decision. After receiving further submissions from Mr. Brar, the Inland Enforcement Officer once again recommended that he be referred for an admissibility hearing in relation to his serious criminality, as well as his involvement in organized criminality and transnational crime. A Minister's Delegate subsequently adopted that recommendation, and referred Mr. Brar's case to the Immigration Division of the Immigration and Refugee Board, and it is this decision that underlies this application for judicial review.

[11] Mr. Brar has never claimed that he would be at risk if he were returned to India. He further concedes that he is inadmissible to Canada as a result of his American drug conviction, and that he would inevitably be found to be inadmissible by the Immigration Division. He notes, however, that if his case goes to an admissibility hearing, the Immigration Division would have no equitable jurisdiction to consider humanitarian and compassionate factors before issuing a removal order against him.

[12] Moreover, because the punishment for Mr. Brar's offence could have exceeded 10 years, had the offence been committed in Canada, he is not entitled to appeal the Immigration Division's finding to the Immigration Appeal Division of the Immigration and Refugee Board. Mr. Brar is also permanently barred from seeking humanitarian and compassionate relief under section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, because he is inadmissible to Canada under section 37 of the Act for organized criminality and transnational crime. Consequently, the *only* place where Mr. Brar's humanitarian and compassionate considerations can be considered is at the referral stage.

II. Analysis

[13] Before addressing Mr. Brar's arguments with respect to the alleged deficiencies in the referral decision, I would start by observing that there is some debate as to the scope of the discretion conferred on Minister's Delegates in deciding whether to refer an individual for an admissibility hearing. Some cases suggest that a Minister's Delegate has no discretion in this regard, while other cases indicate that a Minister's Delegate does possess some, albeit it limited discretion not to refer cases for admissibility hearings: *Faci v. Canada (Public Safety and Emergency Preparedness)*, 2011 FC 693 at paras. 22-31, [2011] F.C.J. No. 893.

[14] I do not need to resolve this question in this case, as it is clear that the Minister's Delegate considered that he had discretion to decide whether or not Mr. Brar's case should be referred for an admissibility hearing. The Minister's Delegate determined, however, that the circumstances of Mr. Brar's case did not justify the exercise of that discretion in his favour.

[15] In his submissions to the Inland Enforcement Officer, Mr. Brar made brief reference to the potential breach of his rights under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. It will be recalled that section 7 states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

[16] Because of the serious consequences that removal from Canada would have for him, Mr. Brar submits that his section 7 rights were engaged in the referral process. As a consequence, Mr. Brar submitted that the Officer had to exercise his discretion in accordance with the principles of fundamental justice. According to Mr. Brar, this required that his case not be referred for an admissibility hearing on the basis that there are sufficient compelling humanitarian and compassionate grounds to permit him to retain his permanent resident status, and removal would violate his constitutional rights.

[17] Citing the Supreme Court of Canada's decision in *Doré v. Barreau du Québec*, 2012 SCC 12 at paras. 55-57, [2012] 1 S.C.R. 395, Mr. Brar argues that the Supreme Court has held that in considering *Charter* values in the exercise of statutory discretion, administrative decision-makers must balance the *Charter* values with the statutory objectives. The decision-maker must then ask how the *Charter* value at issue can best be protected in view of those statutory objectives.

According to *Doré*, “[t]his is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives”: at para. 56.

[18] The Supreme Court went on in *Doré* to note that on judicial review, the question for the reviewing Court is “whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play”. This determination is to be made applying the reasonableness standard of review: at para. 57.

[19] According to Mr. Brar, because *Charter* values were at play in this case, the Minister’s Delegate was required to exercise his discretion in a manner that best protected Mr. Brar’s security of the person. This required that the Minister’s Delegate not refer Mr. Brar’s case to the Immigration Division for an admissibility hearing.

[20] There are several reasons why I do not accept Mr. Brar’s submission.

[21] First of all, I have serious doubts that Mr. Brar’s section 7 rights were engaged in this process. The jurisprudence is clear that deportation *per se* does not engage section 7 of the Charter, and that section 7 is, moreover, not engaged at the stage of determining admissibility to Canada: see, for example, *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58 at paras. 74-75, [2015] 3 S.C.R. 704; *Torre v. Canada (Citizenship and Immigration)*, 2015 FC 591, [2015] F.C.J. No. 601; *Stables v. Canada (Citizenship and Immigration)*, 2011 FC 1319, [2013] 3 F.C.R. 240.

[22] The Supreme Court teaches that in determining whether section 7 of the Charter is engaged, regard has to be had to the nature of the interests at stake: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 18, [2007] 1 S.C.R. 350.

[23] There has never been any suggestion that Mr. Brar is at risk in India. Indeed, the types of harm that Mr. Brar asserts will befall him if he is removed from Canada are typical consequences of deportation including family separation, loss of establishment and the need to become re-established in a country left years before. This distinguishes Mr. Brar's situation from cases such as *Charkaoui*, above, where the named individual's liberty interests had been affected by his detention under a Security Certificate, and *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, where individuals faced the prospect of deportation to torture.

[24] Indeed, as Justice de Montigny noted in *Stables*, above at para. 42, “[i]t was the risk of torture on removal, though, and not the fact of removal itself, that engage the applicant’s section 7 interests in [*Suresh*]”.

[25] Similarly, in *Torre*, above, Justice Tremblay-Lamer concluded that section 7 of the *Charter* was not engaged where a long-term resident of Canada was being deported for having been convicted of trafficking in cocaine, because the individual in question was not being deported to a country where he faced torture: at para. 71.

[26] Even if I were to accept that Mr. Brar's section 7 rights were engaged in the process at issue in this application, however, that would not be the end of the matter. Section 7 *Charter* rights are not absolute: individuals can be deprived of their life, liberty or security of the person,

provided that this occurs through a process that accords with the principles of fundamental justice.

[27] In this case, Mr. Brar had a face-to-face interview with the Inland Enforcement Officer. He was repeatedly afforded the opportunity to provide written submissions in support of his request not to be referred for an admissibility hearing, and he provided the Officer with copious submissions that had been prepared with the assistance of counsel. Mr. Brar was provided with draft recommendations prepared by the Inland Enforcement Officer for consideration by a Minister's Delegate, and he was given the right to comment on them. Any errors in the draft reports that were identified by Mr. Brar were corrected, and a thorough analysis of Mr. Brar's case was provided to the Minister's Delegate. This analysis is considered to be part of the Minister's Delegate's reasons: *Huang v. Canada (Public Safety and Emergency Preparedness)*, 2015 FC 28 at para. 88, 473 F.T.R. 91.

[28] Moreover, the Minister's Delegate had regard to the objectives of the *Immigration and Refugee Protection Act* and the seriousness of Mr. Brar's criminal offence. He then weighed these considerations against Mr. Brar's humanitarian and compassionate factors, as he was required to do by both Canadian and international law.

[29] In other words, the Minister's Delegate balanced the severity of the interference with what Mr. Brar asserts was his *Charter*-protected right to security of the person right against the statutory objectives and the nature of Mr. Brar's criminal conviction. He then came to the conclusion that the seriousness of Mr. Brar's criminal conviction outweighed the humanitarian and compassionate factors that supported the exercise of discretion in Mr. Brar's favour.

[30] This was a conclusion that was reasonably open to the Minister's Delegate on the record before him. I am, moreover, satisfied that it represents a proportionate balancing of the competing interests at stake: *Doré*, above at para. 57, *Singh v. Canada (Citizenship and Immigration)*, 2016 FCA 96 at para. 57, [2016] F.C.J. No. 315.

[31] Mr. Brar has not identified any further information that he was unable to provide to either the Inland Enforcement Officer or the Minister's Delegate that could possibly have assisted his case. Nor has he identified any principle of fundamental justice that was not complied with in relation to the Minister's Delegate's determination that Mr. Brar should be referred to the Immigration Division for an admissibility hearing.

[32] In essence, what Mr. Brar says is that the Minister's Delegate gave too much weight to the seriousness of his criminal conviction and not enough weight to his humanitarian and compassionate factors, and that this breached principles of fundamental justice. It is not, however, this Court's role to usurp the role of the Minister's Delegate and reweigh the evidence to reach a different conclusion.

[33] Mr. Brar also argued in his memorandum of fact and law that the Minister's Delegate made certain findings of fact that were unsupported by the evidence. The respondent's memorandum of fact and law identified the evidence in the record that supported the findings in question, and no reviewable error has been demonstrated by Mr. Brar in this regard. Indeed, the fact that evidence from the psychologist's report was referred to in the Inland Enforcement Officer's analysis simply confirms the thoroughness that was applied to the review of Mr. Brar's submissions.

III. Conclusion

[34] For these reasons, the application for judicial review is dismissed. I agree with the parties that the case is fact-specific, and does not raise a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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