Federal Court  Cour fédérale

Date: 20161209

Docket: IMM-1698-16

Citation: 2016 FC 1363

Ottawa, Ontario, December 9, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

BRYAN ALBERTO DISCUA MELENDEZ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Bryan Alberto Discua Melendez, is a 21 year old citizen of Honduras who arrived in Canada as a permanent resident on January 22, 2006 when he was ten years old. On January 12, 2015, he was convicted of two offences under the *Criminal Code*, RSC, 1985, c C-46, an event which in turn resulted in him being referred to an admissibility hearing before the Immigration Division of the Immigration and Refugee Board. He has now applied under

subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*] for judicial review of the decision to refer him to an admissibility hearing.

I. Background

[2] The Applicant currently lives in Burnaby, British Columbia, with his girlfriend, his infant child, his mother, his two younger sisters, and his younger brother. He is the principal source of financial support for his family. His wife is unemployed and his mother cannot work due to her disability.

[3] On November 7, 2013, the Applicant, then 18 years old, was involved in two robberies and on January 12, 2015 he was convicted of assault with a weapon and theft, contrary to subsection 267(a) and section 334 of the *Criminal Code*, respectively. He received a conditional sentence of fifteen months with a twelve month probation order.

[4] On May 27, 2015, the Applicant received a letter from the Canada Border Services Agency [CBSA], warning that a report under subsection 44(1) of the *IRPA* might be prepared against him and advising that he could make written submissions as to why a removal order should not be sought. The next day, a CBSA officer [the Officer] issued a report under subsection 44(1) which alleged that the Applicant was inadmissible to Canada on grounds of serious criminality pursuant to paragraph 36(1)(a) of the *IRPA*. On June 15, 2015, the Applicant's lawyer asked the Officer to defer forwarding the report until he could provide written submissions; the Officer agreed to defer forwarding the report to a manager until July 6, 2015. Several weeks then passed and on July 30, 2015, after receiving no submissions from the

Applicant or his lawyer, the Officer forwarded the report for managerial review by the Minister's delegate [the Delegate].

[5] In the subsection 44(1) report, the Officer reviewed the Applicant's case history, including his arrival to Canada and the events that had led to his *Criminal Code* convictions. The Officer noted that the Applicant had confessed to the police and appeared "genuinely remorseful." The Officer did not know whether the Applicant had any extended family in Canada other than his mother or whether his family was financially dependent on him. The Officer also noted that the lack of submissions made it difficult to judge the Applicant's attitude towards the convictions and his potential for rehabilitation. The Officer's recommendation that the Applicant be convoked to an admissibility hearing was accepted by the Delegate who, on August 21, 2015, referred the Officer's report pursuant to subsection 44(2) of the *IRPA* to the Immigration Division for an admissibility hearing.

[6] On March 21, 2016, a different lawyer for the Applicant provided written submissions for consideration and requested that the Applicant's referral for an admissibility hearing be withdrawn. The Applicant's submissions requested the Officer to withdraw the report and instead issue a warning letter in view of various humanitarian and compassionate [H&C] factors. The Applicant provided financial information to show that he was the principal source of income for his family and then pregnant girlfriend. The Applicant outlined his family's monthly expenses and detailed how his income supported his girlfriend and family. The Applicant claimed it was not in the best of interests of his two minor sisters (aged 4 and 10 at the time of the submissions) and his then unborn child for him to be found inadmissible. According to the

Applicant, his inadmissibility, inability to work in Canada, or removal from Canada, "would cause severe emotional and financial hardship on his younger brother and sisters, and also his unborn daughter once she is born." The Applicant referred to *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 36, 37 and 40, [2015] 3 SCR 909, the objectives of the *IRPA*, and Canada's international obligations, to urge the Officer to consider the best interests of his siblings and unborn child, as well as his mother and girlfriend, in deciding whether to refer the report to the Delegate. The Applicant requested that the Officer exercise his discretion and issue a warning letter.

[7] However, after considering the submissions, the Officer again recommended that the Applicant be referred to the Immigration Division for an admissibility hearing. The Officer amended his report on April 8, 2016, stating as follows:

> On 22MAR2016, I was informed by HO MEDLY that DISCUA legal counsel, Fritz Gaerdes, had provided submissions to CBSA at the 21MAR2016 ADH hearing for consideration. The entire submissions package (30 pages) was reviewed and considered. Included in the package were: a background of DISCUA's case, details regarding DISCUA's unborn child and financial support he provides his family, an affidavit from DISCUA and his girlfriend SANTALUCIA, medical and financial documents.
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> The previously unknown information was reviewed and considered. DISCUA's provides his family financial support through his gainful employment, his mother, brother, and two minor sisters live in Canada, he has an unborn child who is due in August 2016, and he expresses remorse for the offenses that he committed.
>
> After reviewing all relevant information and submissions, due [to] the seriousness of the offenses committed, I continue to recommend that DISCUA be convoked to an Admissibility Hearing for the 36(1) allegation.

[8] The Delegate accepted the Officer's recommendation on April 14, 2016, noting the following on the subsection 44(1) report:

> Refer to A.H. [Admissibility Hearing] (not withdraw referral). Concur w/ recommendation. New submissions reviewed & considered

[9] On April 14, 2016, the Delegate referred the Officer's amended report to the Immigration Division for an admissibility hearing.

II. Issues

[10] This application for judicial review raises two issues:

1. What is the appropriate standard of review?
2. Is the decision referring the Applicant for an admissibility hearing reasonable?

III. Analysis

A. *Standard of Review*

[11] It is well established that a decision to refer a permanent resident to an admissibility hearing pursuant to subsection 44(2) of the *IRPA* is reviewed on the reasonableness standard (see *Faci v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 693 at para 17, [2011] FCJ No 893 [*Faci*]; *Richter v Canada (Citizenship and Immigration)*, 2008 FC 806 at para 9, [2009] 1 FCR 675 [*Richter*], aff'd 2009 FCA 73, [2009] FCJ No 309). Similarly, the adequacy of the reasons for such a decision is also reviewed on the reasonableness standard (*Berisha v Canada (Attorney General)*, 2016 FC 755 at para 18, [2016] FCJ No 726).

[12] This being so, although the Court can intervene "if the decision-maker has overlooked material evidence or taken evidence into account that is inaccurate or not material" (*James v Canada (Attorney General)*, 2015 FC 965 at para 86, 257 ACWS (3d) 113), it should not intervene if the decision is intelligible, transparent, and justifiable, and defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708.

B. *Is the decision referring the Applicant for an admissibility hearing reasonable?*

[13] The Applicant argues that the decision is unreasonable because it fails to consider whether there were H&C considerations that favoured not referring the report to the Immigration Division. The Applicant notes that the *Operational Manual ENF 6: Review of reports under A44(1)* [the Manual] specifically contemplates H&C considerations in cases involving permanent residents, since the Minister's delegate may consider such matters as the location of family support and responsibilities and whether there are any family members in Canada who are "emotionally or financially dependent on the permanent resident."

[14] The Applicant contends that a decision-maker's failure to consider the best interests of a child affected by the decision renders their decision unreasonable. The Applicant submits that the Delegate in this case completely failed to consider the best interests of the Applicant's unborn child and minor siblings. According to the Applicant, a mere statement that the best interests of

the minor children have been considered is insufficient. The Applicant maintains that the Delegate and the Officer each failed to expressly identify, define, examine, and weigh the best interests of the Applicant's minor age siblings and unborn child.

[15] The Respondent argues that the Officer did not have discretion to overlook the Applicant's convictions and not prepare the report, whereas the Delegate only had limited discretion to not refer the matter to the Immigration Division. According to the Respondent, the Officer did not have discretion to consider H&C grounds in preparing the report and the Delegate reasonably exercised his limited discretion by considering the H&C grounds raised by the Applicant. The Respondent submits that the Applicant has the burden of proof to demonstrate the H&C grounds and, as a result of the Applicant's failure to discharge this burden, the Delegate reasonably concluded that the H&C grounds raised by the Applicant did not outweigh his criminality.

[16] This case boils down to what discretion a Minister's delegate has pursuant to subsection 44(2) of the *IRPA* not to refer a permanent resident, such as the Applicant, to an admissibility hearing even if he has been found to meet the criteria set out in paragraph 36(1)(a). The jurisprudence is somewhat in flux on this issue inasmuch as the Federal Court of Appeal has not yet had an opportunity to fully address and resolve the issue. As noted in *Canada (Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237, [2015] FCJ No 1324:

> [12] Both parties agree that the Minister's delegate had some discretion, albeit a limited one, not to refer a permanent resident such as Mr. Tran to an admissibility hearing even if he was found to meet the criteria set out in paragraph 36(1)(a) (*Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, [2006] 1 F.C.R. 3, and chapter ENF 6 – Review of reports under

> A44(1) of the Citizenship and Immigration Canada (CIC), Enforcement Manual (Enforcement Manual) (Joint Book of Authorities, Vol. 4, Tab 113)). As this was not an issue before the judge or this Court, I will assume for the purposes of this appeal only that this is so. I note however that this is an issue that will need to be resolved at some point in the future given our Court's decision in *Canada (Minister of Public Safety and Emergency Preparedness) v. Cha*, 2006 FCA 126 at para 41, [2007] 1 F.C.R. 409.

[17] In *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, [2006] 1 FCR 3 [*Hernandez*], Justice Snider determined that both an immigration officer and a delegate of the Minister have discretion under section 44, stating that:

> [42] … I conclude that the scope of the discretion of an immigration officer under s. 44(1) and of the Minister's delegate under s. 44(2) is broad enough for them to consider the factors outlined in the relevant sections of the CIC Procedural Manual. To the extent that some of these factors may touch upon humanitarian and compassionate considerations, I see no issue.

[18] It must be noted that *Hernandez* involved a permanent resident, not a foreign national, as was the case in *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 FCR 409, where the Federal Court of Appeal concluded that:

> [35] …the wording of sections 36 and 44 of the Act and of the applicable sections of the Regulations does not allow immigration officers and Minister's delegates, in making findings of inadmissibility under subsections 44(1) and (2) of the Act in respect of persons convicted of serious or simple offences in Canada, any room to manoeuvre apart from that expressly carved out in the Act and the Regulations. Immigration officers and Minister's delegates are simply on a fact-finding mission, no more, no less. Particular circumstances of the person, the offence, the conviction and the sentence are beyond their reach. It is their respective responsibility, when they find a person to be inadmissible on grounds of serious or simple criminality, to prepare a report and to act on it.

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> [37] …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 (see *Correia* at paragraphs 20 and 21; *Leong* at paragraph 21; *Kim* at paragraph 65; *Lasin v. Canada (Minister of Citizenship and Immigration)*, [2005] FC 1356 at paragraph 18).
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> …
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> [41] I appreciate that before the Standing Committee the Minister and senior bureaucrats have expressed the view that personal circumstances of the offender would be considered at the front end of the process before any decision is taken to remove them from Canada (see *Hernandez* at paragraph 18). I also appreciate that the Manual contains some statements to the same effect (see *Hernandez* at paragraphs 20 to 23). However, these views and statements were all expressed or made in respect of permanent residents convicted of serious offences in Canada. No such assurances were given by specific reference to foreign nationals. I need not, therefore, decide what weight, if any, I would have given to such assurances in the circumstances of the present case. Whether weight was properly given to such assurances in *Hernandez* (where the issue was the scope of the Minister's delegate's discretion to refer a report of inadmissibility in respect of permanent residents to the Immigration Division), is a question better left for another day. I note that questions were certified in Hernandez, but the appeal has been abandoned (A-197-05).

[19] More recently, the Federal Court of Appeal in *Bermudez v Canada (Citizenship and Immigration)*, 2016 FCA 131, [2016] FCJ No 468 [*Bermudez*], observed that:

> [44] … a number of decisions post *Hernandez*, including decisions involving permanent residents, have tended to significantly narrow the discretion contemplated at section 44 of the IRPA in *Hernandez* (*Nagalingam v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 141, [2012] F.C.J. No. 1517 (QL); *Faci v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2011 FC 693, [2011] F.C.J. No. 893

> (QL); *Richter v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 806, [2009] 1 F.C.R. 675; *Spencer v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 990, [2006] F.C.J. No. 1269 (QL)).

[20] It is helpful at this point, prior to assessing the reasonableness of the referral decision in this case, to summarize some of the relevant jurisprudence on the issue of whether an officer and the Minister's delegate have any discretion in the preparation and referral of a report under section 44 of the *IRPA*, and if so, the extent of any such discretion.

[21] As quoted above, *Hernandez* clearly states that an immigration officer as well as the Minister's delegate has discretion to consider humanitarian and compassionate grounds under section 44 of the *IRPA*.

[22] In contrast, in *Richter*, Justice Mosley stated:

> [12] As I noted in *Awed v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 469, 46 Admin. L.R. (4th) 233, the purpose of an interview under subsection 44(1) of the IRPA is "simply to confirm the facts that may support the formation of an opinion by the officer that a permanent resident or foreign national present in Canada is inadmissible." Where such facts are found to exist, the officer has a responsibility to prepare a report and is not empowered by the statute to exercise discretion.
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> …
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> [14] In respect of the Manager's decision to refer the report pursuant to subsection 44(2), the Federal Court of Appeal held in *Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 F.C.R. 409, that the scope of discretion available to the Minister's delegate was heavily dependant on the circumstances, including whether the person subject to referral was a permanent resident or foreign national. While a Minister's delegate was found in *Cha* to have no discretion in the case of a foreign national convicted of a serious offence in Canada, the

> question was left open whether some minimal amount of discretion was available to the Manager in deciding whether to refer the report to the Immigration Division with respect to a permanent resident, as in this case.

[23] In *Faci*, the Court stated:

> [25] *Lee v Canada (Minister of Citizenship and Immigration)*, 2006 FC 158, and *Richter v Canada (Minister of Citizenship and Immigration)*, 2008 FC 806 (affirmed by the Federal Court of Appeal), both indicate that the minister's delegate may have some discretion to consider humanitarian and compassionate factors but that the decision under subsection 44(2) is not a full-blown humanitarian and compassionate review. The general consensus seems to be that the Act provides opportunities elsewhere for the applicant to raise H&C issues. [Emphasis in original]

[24] In *Fabbiano v Canada (Citizenship and Immigration)*, 2014 FC 1219, [2014] FCJ No 1262, the Court stated:

> [15] The role of the Minister's delegate is to consider the evidence relevant to admissibility, and to exercise his or her discretion in the circumstances, which may include H&C factors (*Faci v Canada (Minister of Public Safety and Emergency Preparedness*), 2011 FC 693, at para 31). The latter are more significant in cases involving persons, like Mr Fabbiano, who are long-term permanent residents of Canada. According to departmental guidelines, a delegate should consider the person's age, the duration of his or her residence in Canada, family circumstances, conditions in the person's country of origin, the degree of the person's establishment in Canada, the person's criminal history, and his or her attitude (see Citizenship and Immigration Canada, "ENF 6 - Review of reports under A44(1)" at 19.2).

[25] In *Balan v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 691, [2015] FCJ No 688, the Court noted that:

> [26] … It is true that this Court, in *Hernandez*, took the view that the Minister's discretion is somewhat broader when deciding whether to refer a permanent resident convicted of serious offences in Canada to the ID. Unfortunately, the certified question pertaining to that issue was left unanswered as a result of the appeal having been abandoned, and the Federal Court of Appeal in *Cha* thought it best to leave that question for another day. Be that as it may, it is probably safe to say that the Minister's discretion is relatively narrow under section 44, if only because paragraph 36(1)(a) does not call for much judgment in its implementation. That section is met as soon as a permanent resident or foreign national has either been convicted in Canada of an offence with a maximum term of at least 10 years or of an offence for which a term of imprisonment of more than six months has been imposed…
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> …
>
> [27] To the extent that sections 36(1) (a) and 44(1) allow a residual discretion for the immigration officer to take into account humanitarian and compassionate considerations, they have been considered. The Officer extensively summarized the Applicant's submissions in this respect and obviously turned his mind to them….

[26] More recently, in *Pham v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 824, [2016] FCJ No 774, the Court observed that:

> [18] In deciding whether the case must be referred to the ID, the Minister's delegate did not conduct an in-depth review of the humanitarian and compassionate considerations. Therefore, although the Minister's delegate is allowed a residual discretion to take into account humanitarian and compassionate considerations (*Balan*, above, at paragraph 27; *Richter*, above), the decision made by the Minister's delegate under subsection 44(2) of the IRPA is not a full in-depth review of the humanitarian and compassionate considerations (*Faci*, above, at paragraph 25). Insofar as the Minister's delegate had this residual discretion, he considered these reasons in a reasonable manner.

[27] As noted by the Federal Court of Appeal in *Bermudez*, decisions subsequent to *Hernandez* have narrowed the scope of discretion as articulated in *Hernandez*. For example, in

Rosenberry v Canada (Citizenship and Immigration), 2010 FC 882, [2010] FCJ No 1101 [*Rosenberry*], a case involving two citizens of the United States, the Court stated that:

> [36] The substance of the decision did not require the Minister's delegate to consider the H&C application or H&C factors at all. Under section 44 immigration officials are simply involved in fact-finding. They are under an obligation to act on facts indicating inadmissibility. It is not the function of such officers to consider H&C factors or risk factors that would be considered in a pre-removal risk assessment. This was recently confirmed in *Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 (CanLII), [2007] 1 F.C.R. 409 at paragraphs 35 and 37.

[28] In *Finta v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1127 at para 38, [2012] FCJ No 1214, a case involving a foreign national, Justice O'Keefe reiterated his remarks in *Rosenberry*, stating that "H&C factors are not relevant to the section 44 admissibility process."

[29] In *Nagalingam v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1411, [2013] 4 FCR 455, the Court concluded that:

> [34] …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).
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> [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.

[30] In *Kidd c Canada (Sécurité publique et Protection civile)*, 2016 CF 1044, [2016] ACF no 1022, the Court determined that the Minister's delegate has some discretion, but not the obligation, to consider the factors set forth in the Manual in determining whether to refer an inadmissibility report concerning a permanent resident to the Immigration Division:

> [33] Bien que le délégué du ministre dispose d'une certaine discrétion pour déférer le dossier devant la SI, cette discrétion est limitée par la loi. D'abord, la décision du délégué du ministre n'a pas à examiner les considérations humanitaires. L'article 25(1) de la LIPR ne trouve pas directement application, et le fait que des enfants puissent être affectés par la décision du délégué du ministre n'entraîne pas d'obligation ou de résultat particulier (*Cha* au para 38).
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> [34] Par ailleurs, si le Guide contient effectivement une liste de facteurs, cette liste n'est pas exhaustive et ne contient pas d'éléments obligatoires à être considérés dans la pondération de la preuve faite par le délégué du ministre. Le délégué du ministre a ainsi le pouvoir discrétionnaire, et non l'obligation, de prendre en considération les facteurs énoncés dans le Guide (*Faci* au para 63). Or, il appert de la décision elle-même que le délégué du ministre a soupesé l'ensemble des facteurs en jeu. En fait, rien dans la décision n'indique ou ne suggère ici que le délégué du ministre a omis de prendre en considération les facteurs pertinents dans son analyse.

[31] In *Spencer v Canada (Minister of Citizenship & Immigration)*, 2006 FC 990, [2006] FCJ No 1269 [*Spencer*], the Court concluded that:

> [15] The jurisprudence is inconclusive as to the influence the factors outlined in the Policy Manual should have on the officer's discretion. Regardless of the aforementioned inconclusiveness, I am of the opinion that officers can take the Policy Manual factors into consideration when making a decision pursuant to subsection 44(1) of the Act, but it is not their duty to do so.
>
> [16] In the present matter, contrary to the assertions of the applicant, I am of the opinion that the officer did take into consideration humanitarian and compassionate factors and that his decision was not solely based on the applicant's criminal acts. The officer wrote the following:

> The writer is sensitive to the best interests of subject's Canadian-born children in this case, given that subject will not have the right to appeal if ordered deported from Canada. The writer believes that the serious nature of the offence far outweighs any consideration to be given to the children. The writer notes that the children's father has himself relocated to Jamaica, and would apparently be able to continue to provide the financial support he currently provides to them. While subject has been incarcerated, the children have been in the care of subject's mother. These conclusions are supported fully in paragraphs 46 and 47 of the Ontario Court of Appeal decision attached.
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> (officer's narrative report, Tribunal record at pages 3 and 4)

> [17] In light of the above, I find that the officer did not err in the exercise of his discretion. The officer's notes, which are being relied upon as reasons, disclose that all of the relevant factors were considered prior to the applicant's referral to a hearing.

[32] It warrants note that the discretion afforded to a Minister's delegate's under subsection 44(2) of the *IRPA* is clearly recognized in the Manual, where it is stated that the delegate has authority, even if the subsection 44(1) report is well-founded, "not to refer the report to the Immigration Division for an admissibility hearing," but, instead, send "a warning letter" advising that "a decision could be made to refer the report at a later date."

[33] In determining whether a subsection 44(1) report involving a permanent resident should be referred to the Immigration Division, the Manual suggests that a Minister's delegate may consider a list of various non-exhaustive factors, such as: age at time of landing; whether the permanent resident was a child or an adult at the time of admission to Canada; length of residence; location of family support and responsibilities; whether family members in Canada are emotionally or financially dependent on the permanent resident; whether all extended family

members are in Canada; conditions in home country; whether there are any special circumstances in the likely country of removal, such as civil war or a major natural disaster; the degree of establishment; whether the permanent resident is financially self-supporting, employed or employable; whether the permanent resident has received social assistance; whether the permanent resident has been convicted for any prior criminal offence; whether the permanent resident has been cooperative and forthcoming with information; whether a warning letter has been previously issued; and whether the permanent resident is remorseful and accepts responsibility for their actions.

[34] In view of the foregoing, I arrive at the following conclusions:

1. There is conflicting case law as to whether an immigration officer has any discretion under subsection 44(1) of the *IRPA* beyond that of simply ascertaining and reporting the basic facts which underlie an opinion that a permanent resident in Canada is inadmissible.
2. Nevertheless, the jurisprudence and the Manual do suggest that a Minister's delegate has a limited discretion, when deciding whether to refer a report of inadmissibility to the Immigration Division pursuant to subsection 44(2) or to issue a warning letter, to consider H&C factors, including the best interests of a child, at least in cases where a permanent resident, as opposed to a foreign national, is concerned.
3. Although the Minister's delegate has discretion to consider such factors, there is no obligation or duty to do so.

4. However, where H&C factors are presented to a delegate of the Minister, the delegate's consideration of the H&C factors should be reasonable in the circumstances of the case, and in cases where a delegate rejects such factors, the reasons for rejection should be stated, even if only briefly.
5. The consideration of H&C factors by the Minister's delegate in respect of a permanent resident need not be, in my view, as extensive as or comparable to an analysis of such factors under subsection 25(1) of the *IRPA* in order to be reasonable; it need not be so because that would usurp the role and purpose of that subsection.

[35] The Officer in this case summarized the "previously unknown information" in just one sentence: "DISCUA's provides his family financial support through his gainful employment, his mother, brother, and two minor sisters live in Canada, he has an unborn child who is due in August 2016, and he expresses remorse for the offenses that he committed." Immediately after this sentence, the Officer wrote: "After reviewing all relevant information and submissions, due [to] the seriousness of the offenses committed, I continue to recommend that DISCUA be convoked to an Admissibility Hearing for the 36(1) allegation." The Delegate concurred with the Officer's report and noted that he had "reviewed and considered" the Applicant's submissions.

[36] I find the referral decision in this case to be unreasonable because the Officer's written reasons and the Delegate's concurrence with those reasons are completely devoid of any analysis whatsoever of the H&C factors raised by the Applicant, notably as to those in relation to the best interests of the Applicant's younger sisters and unborn child. Indeed, nowhere in the Officer's

report or the Delegate's comments is there even any mention of these factors. Upon review of the reasons for the referral decision, I cannot understand why the Delegate made the decision he did in the face of the H&C factors raised by the Applicant.

[37] Even if the Applicant's submissions may have required further detail, this Court on judicial review cannot speculate as to why the Officer and, in turn, the Delegate rejected the Applicant's submissions which were clearly before them. This is not a case like *Spencer* where the officer's narrative report at least noted being "sensitive to the best interests of subject's Canadian-born children." In this case, the only mention whatsoever of the Applicant's younger sisters and unborn child is in the one sentence summary of the "previously unknown information". There is not even a perfunctory statement that such interests were considered, let alone acknowledged, identified or assessed in any manner whatsoever.

[38] In the circumstances of this case, it was insufficient and unreasonable for the Delegate to simply and only state that the Applicant's submissions had been "reviewed and considered". Neither the Delegate nor, for that matter, the Officer provided any explanation as to why the Applicant's submissions were insufficient. The decision in this case is such that it is not possible to determine whether the Delegate reviewed and considered the Applicant's submissions in a reasonable manner because neither the Delegate nor the Officer offered any meaningful explanation as to why the Applicant's submissions were rejected.

[39] It is true that the Delegate concurred with the Officer's statement that "due [to] the seriousness of the offenses committed," the Applicant should be referred for an admissibility

hearing. However, the seriousness of the offences committed is not, in and of itself, a reason to reject and not engage, even if briefly, with the Applicant's submissions except to the extent of simply acknowledging that they had been reviewed and considered. The seriousness of the offences committed was stated as a standalone conclusion for which no reasons were stated as to why this factor outweighed the various H&C factors raised by the Applicant. The referral decision is unbalanced in this regard and, consequently, unintelligible and cannot be justified in respect of the facts and the law.

IV. Conclusion

[40] The referral decision in this case is not reasonable and, accordingly, must be set aside and the matter returned to a different delegate of the Minister. The referral notice under subsection 44(2) of the *IRPA* for an admissibility hearing dated April 14, 2016 is quashed.

[41] Neither party raised a question of general importance, so no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the decision of the delegate of the Minister of Public Safety and Emergency Preparedness dated April 14, 2016 is set aside and the matter is returned for redetermination by a different delegate in accordance with the reasons for this judgment; the delegate's issuance of a notice of referral notice under subsection 44(2) of the *Immigration and Refugee Protection Act* for an admissibility hearing dated April 14, 2016 is set aside; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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