Federal Court  Cour fédérale

Date: 20170609

Docket: IMM-4180-16

Citation: 2017 FC 562

Ottawa, Ontario, June 9, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

YANG LIU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of the decision of an Inland Enforcement Officer [Minister's Delegate or MD] of the Canada Border Services Agency [CBSA], dated September 22, 2016 [Decision], which issued a Deportation Order against the Applicant.

II. BACKGROUND

[2] The Applicant is a 25 year-old citizen of China. He entered Canada in September 2012 to commence studies at Seneca College.

[3] On January 26, 2016, the Applicant was summarily convicted of theft of a credit card under s 342(1)(c)(i) of the *Criminal Code*, RSC 1985, c C-46 [*Code*]. He was sentenced to 170 days of house arrest.

[4] The Applicant submitted an application for a post-graduate work permit in May 2016, which was refused on July 18, 2016.

[5] Shortly after that, the Applicant received a Notice to Appear for a Minister's Delegate's Review set for August 16, 2016 [first MDR]. The Applicant appeared at the first MDR accompanied by his counsel. At the review, the Applicant's counsel requested that the report issued under s 44(2) of the *IRPA* [Report] be re-written on the basis that it stated the Applicant had been convicted of an indictable offence even though he had been summarily convicted. The matter was adjourned to allow the author of the Report to consider the request. Upon consideration, the author concluded a rewrite was unnecessary because s 36(3) of the *IRPA* treats all hybrid offences as indictable, even if the offence is prosecuted summarily.

[6] A second Minister's Delegate Review hearing was set for September 22, 2016 [second MDR]. The Applicant appeared at the second review alone.

III. DECISION UNDER REVIEW

[7] The Decision under review consists of the Deportation Order against the Applicant dated September 22, 2016 and the completed Minister's Delegate Review form [MDR form]. These documents indicate that the Applicant is deemed inadmissible under s 36(1)(a) of the *IRPA* due to serious criminality.

IV. ISSUES

[8] The Applicant submits that the following are at issue in this proceeding:

A. Did the MD err in not realizing that the Applicant barely spoke or understood English and required an interpreter?

B. Did fairness require the MD to allow the Applicant the opportunity to have legal counsel present during the interview?

C. Did the MD err in concluding that the Applicant was inadmissible due to serious criminality?

D. Does the evidence demonstrate that the Applicant understood the MD, was able to participate in a meaningful way, and waived the right to have an interpreter and legal counsel present?

V. STANDARD OF REVIEW

[9] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[10] The first, second and fourth issues are matters of procedural fairness and will be reviewed under the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*].

[11] The third issue concerns a question of mixed fact and law and is reviewable under reasonableness: *Pompney v Canada (Citizenship and Immigration)*, 2016 FC 862 at para 12.

[12] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above,

at paragraph 47, and *Khosa*, at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[13] The following provisions of the *IRPA* are relevant in this proceeding:

Serious criminality	**Grande criminalité**
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 :
(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;	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;
[…]	[…]
Application	**Application**
36(3) The following provisions govern subsections (1) and (2):	36(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :
(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;	a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite

effectivement retenu;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect under the Criminal Records Act, or in respect of which there has been a final determination of an acquittal;

b) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquittement rendu en dernier ressort ou en cas de suspension du casier — sauf cas de révocation ou de nullité — au titre de la Loi sur le casier judiciaire;

(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

c) les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n'emportent pas interdiction de territoire pour le ré- sident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

(d) a determination of whether a permanent resident has committed an act described in paragraph (1)(c) must be based on a balance of probabilities; and

d) la preuve du fait visé à l'alinéa (1)c) est, s'agissant du résident permanent, fondée sur la prépondérance des probabilités;

(e) inadmissibility under subsections (1) and (2) may not be based on an offence

e) l'interdiction de territoire ne peut être fondée sur les infractions suivantes :

(i) designated as a contravention under the Contraventions Act,

(i) celles qui sont qualifiées de contraventions en vertu de la Loi sur les contraventions,

(ii) for which the permanent resident or foreign national is found guilty under the Young Offenders Act, chapter Y-1 of the Revised Statutes of

(ii) celles dont le résident permanent ou l'étranger est déclaré coupable sous le régime de la Loi sur les jeunes contrevenants, chapitre Y-1

Canada, 1985, or

(iii) for which the permanent resident or foreign national received a youth sentence under the Youth Criminal Justice Act.

[…]

Preparation of report

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.

Referral or removal order

(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 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.

Conditions

(3) An officer or the Immigration Division may

des Lois révisées du Canada (1985),

(iii) celles pour lesquelles le résident permanent ou l'étranger a reçu une peine spécifique en vertu de la Loi sur le système de justice pénale pour les adolescents.

[…]

Rapport d'interdiction de territoire

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.

Suivi

(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 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.

Conditions

(3) L'agent ou la Section de l'immigration peut imposer les

impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer or the Division considers necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, being in Canada, a removal order.	conditions qu'il estime nécessaires, notamment la remise d'une garantie d'exécution, au résident permanent ou à l'étranger qui fait l'objet d'un rapport ou d'une enquête ou, étant au Canada, d'une mesure de renvoi.

[14] The following provisions of the *Code* are relevant in this proceeding:

Theft, forgery, etc., of credit card	**Vol, etc. de cartes de crédit**
342 (1) Every person who	342 (1) Quiconque, selon le cas :
[…]	[…]
(c) possesses, uses or traffics in a credit card or a forged or falsified credit card, knowing that it was obtained, made or altered	c) a en sa possession ou utilise une carte de crédit — authentique, fausse ou falsifiée, — ou en fait le trafic, alors qu'il sait qu'elle a été obtenue, fabriquée ou falsifiée :
(i) by the commission in Canada of an offence,	(i) soit par suite de la commission d'une infraction au Canada,
[…]	[…]
is guilty of	est coupable :
(e) an indictable offence and is liable to imprisonment for a term not exceeding ten years, or	e) soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans;
(f) an offence punishable on summary conviction.	f) soit d'une infraction punissable sur déclaration de

culpabilité par procédure sommaire.

VII. ARGUMENTS

A. *Applicant*

(1) Request for an Interpreter

[15] The Applicant submits that the MD erred by persuading the Applicant to proceed with the second MDR despite the absence of an interpreter. The Applicant states that he informed the MD that he did not understand the proceedings, but he consented to proceed without an interpreter when the MD told him that his English was fine. This is supported by the MDR form, which demonstrates that the answer to the question, "Do you require an interpreter?" was initially "Yes," but was then changed to "No," with the change to the "Yes" answer initialed by the MD.

[16] Given that the Applicant's first language is Mandarin, and not English, and the significance of the hearing, the Applicant submits that the MD should have exercised caution and postponed the second MDR until an interpreter was present. Instead, the MD proceeded with the review.

(2) Absence of Legal Counsel

[17] The Applicant also submits that the MD erred in proceeding with the second MDR despite the absence of the Applicant's counsel. Given that the MD was aware that the Applicant had retained counsel, that the Applicant had informed the MD that he did not understand the

proceedings, and the importance of the hearing, the Applicant submits that the MD should have exercised caution and postponed the hearing until the Applicant's counsel was present. Instead, the MD proceeded with the review.

(3) Serious Criminality

[18] The Applicant argues that the MD erred in concluding he was inadmissible due to serious criminality. The Applicant was summarily convicted and sentenced to only 5 months of house arrest. The Applicant's counsel, though absent at the hearing, had provided a letter outlining these facts. The Applicant submits that the MD did not have regard to his material in concluding that the Applicant was inadmissible due to serious criminality.

B. *Respondent*

(1) Reasonableness

[19] The Respondent submits that the Decision is reasonable. Hybrid offences are considered indictable, even if processed via summary conviction, under s 36(3)(a) of the *IRPA*. The Applicant was convicted under s 342(1)(c)(i) of the *Code*, which is a hybrid offence. As a result, the choice of summary conviction is not relevant to the finding of inadmissibility.

(2) Request for an Interpreter

[20] The Respondent refutes the Applicant's claim that he requested or needed an interpreter. The MD has confirmed in an affidavit that the Applicant did not request nor need an interpreter.

In addition to conversing with the Applicant to confirm that he understood English, the MD confirmed at least two more times that the Applicant understood the nature of the proceedings. Moreover, the Applicant was provided with two Notices to Appear that stated he could bring an interpreter to the hearings, if one was needed, but he chose not to do so.

[21] The Respondent notes that the Applicant had attended the first MDR without an interpreter, where the same MD explained the process to him. Additionally, the Respondent points out that the Applicant has remained in Canada on a student visa, which requires proof of his English abilities. Consequently, the Respondent submits that the Applicant's allegation that he did not understand the proceedings should be given little weight. Instead, the Respondent requests that the Court allocate more weight to the affidavit of the MD, who took notes of the proceedings and is disinterested in the outcome of this judicial review.

(3) Absence of Legal Counsel

[22] The Respondent argues that the presence of the Applicant's counsel was not required because there is no right to counsel at a removal order determination unless the person concerned is detained. In this case, the Applicant did not request an adjournment so that his counsel could attend. Moreover, the Applicant's counsel had an opportunity to participate through attendance and written objections at the first MDR. Additionally, the Applicant has not demonstrated any prejudice from the absence of counsel at the second MDR. And finally, the result of the review was inevitable because the discretion of the MD was restricted to fact-finding and the Applicant had conceded all relevant facts. Accordingly, the proceedings were procedurally fair.

C. *Applicant's Further Argument*

[23] The Applicant further argues that he was denied natural justice and procedural fairness.

(1) Factual Dispute

[24] The Applicant submits that the issue is whether the Applicant waived his right to have an interpreter and legal counsel present at the second MDR. In support of his position that he did not provide such a waiver, the Applicant relies on the Notice of Appearance which was stamped by his counsel as well as the MDR form.

[25] First, the Applicant claims the Notice of Appearance demonstrates his desire to exercise his right to counsel. However, counsel was not present at the interview.

[26] Second, the Applicant claims the MDR form demonstrates his desire to exercise his right to an interpreter. The documentary evidence shows that the initial response to whether he required an interpreter was "yes." In her affidavit, the MD states that she could not recall why the "yes" box was checked but it was likely due to a clerical error. The Applicant disputes that he approved of the change.

[27] The Applicant submits that the documentary evidence should be given the most weight in the determination of the factual dispute. In this case, the documentary evidence indicates that counsel was to be present and that an interpreter was required and requested.

(2) Inevitability

[28] The Applicant also takes issue with the Respondent's argument that the result of the review was inevitable.

[29] First, a likely outcome is not a sufficient reason to dispense with procedural fairness.

[30] Second, if the outcome was inevitable, then there was no reason for the Applicant to be present at the interview.

[31] Third, the Applicant submits that the MD required the Applicant to satisfy certain factors prior to making the Decision. The MD concedes in her affidavit that the Applicant had a right to an interpreter and counsel. She confirms that if either is requested during an interview, she would normally stop the review and adjourn the proceedings. The MD also indicates that the deportation order is decided only after finding that the allegations in the Report are well-founded, that the applicant understands the proceedings, and there is no reason the applicant cannot return to their home country. Although it is not clear whether the presence of counsel or an interpreter would have impacted the proceedings, it is clear that their participation would have been taken into consideration in the Decision. Accordingly, the Applicant submits that he was denied procedural fairness.

D. *Respondent's Further Argument*

(1) Reviewable Error

[32] The Respondent maintains that there is no reviewable error.

[33] The Applicant's arguments regarding the substance of the Decision must fail based on the operation of s 36(3)(a) of the *IRPA*. The Applicant is inadmissible to Canada for serious criminality and has not established that the facts underlying the inadmissibility finding are inaccurate. He has also not shown that he was prejudiced due to the absence of counsel or an interpreter, nor has he adduced evidence to demonstrate how the presence of counsel or an interpreter would have changed the Decision. The Applicant's only argument against the legality of the Report was submitted in writing to the MD prior to the Decision.

(2) Access to Counsel

[34] The Respondent challenges the Applicant's argument that there is evidence on the record that demonstrates he desired his counsel to attend the interview on September 22, 2016. The Applicant and his counsel received the Notice to Appear two weeks prior to the second MDR, yet his counsel did not appear and there is no evidence to demonstrate his counsel sought a postponement of the interview. Additionally, the Applicant did not request an adjournment of the proceedings to allow his counsel to attend.

(3) Prejudice Due to Absence of Counsel

[35] The Respondent also maintains that the Applicant was not prejudiced by the absence of counsel. The MD was limited to fact-finding at the second MDR and there is no dispute regarding the facts in the Report. The only objection involved the mode of conviction and application of s 36(3)(a) of the *IRPA*, which was made orally at the first MDR and in writing post-interview. Accordingly, the absence of counsel did not prevent the Applicant from advancing relevant facts or arguments before the MD.

[36] Moreover, Justice Simpson held in *Gennai v Canada (Citizenship and Immigration)*, 2016 FC 8:

> [17] The final issue is the question of the appropriate remedy. The Applicants say that they have been prejudiced by their lack of Counsel but no evidence has been adduced from Counsel to show what Counsel's submissions would have been, and how they might have affected the Minister's Delegate's decision on the Review.
>
> [18] I have concluded that, in the absence of any evidence of substantive prejudice and given the Applicant's acknowledgement that the Orders are reasonable, the application will not be allowed.

(4) Access to an Interpreter

[37] The Respondent submits that the Applicant was not denied access to an interpreter. The Notice of Appearance clearly advised the Applicant to bring an interpreter if one was necessary, but he did not do so; nor did he request an adjournment to obtain an interpreter. Instead, the Applicant advised the MD on two occasions that he understood the nature of the proceedings.

(5) Remedy

[38] The Respondent also submits that, even if the Court finds the Applicant was denied procedural fairness, this application for judicial review should be dismissed due to inevitability: *Magan v Canada (Citizenship and Immigration)*, 2013 FC 960 at para 45. The Applicant is criminally inadmissible to Canada and a re-determination would yield the same result.

VIII. ANALYSIS

[39] In this application, the sole issue is procedural fairness. As Justice Evans, as he then was, pointed out some time ago now in *Lin v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1148 at para 23:

> [23] On the other hand, courts have also avoided trivialising the duty of fairness by reducing it to the level of formalism. Not every procedural shortcoming amounts to a breach of the duty. To enable a court on an application for judicial review to set aside a decision of an administrative tribunal for procedural unfairness errors must have deprived the individual of what any fair-minded person would regard as a reasonable opportunity to influence the decision-maker through the production of evidence and the making of submissions**.**

[40] In the present case, the Applicant says he was denied procedural fairness at the second MDR because the MD erred in not making sure the Applicant had an interpreter, and in not allowing the Applicant to have legal counsel.

A. *Interpreter*

[41] In his affidavit for this review application the Applicant gives evidence as follows:

> 13. During the interview I told the Officer that my English was very weak and that I required an interpreter.
>
> 14. The Officer convinced me that my English was good and that I should proceed without an interpreter.
>
> […]
>
> 17. I did not understand the full nature of these proceedings or everything that the Minister had said to me.

[42] The Applicant clearly understands English sufficiently to take courses and study International Business at Seneca College, and he has been in Canada since 2012. He is careful in his affidavit to say that he did not understand the "full nature" of the proceedings and "everything" that the MD said. So it is unclear what, of material relevance, the Applicant failed to understand. In fact, the MDR Decision makes it clear that the Applicant understood the basic issue that had to be decided and provided a response on point. In his affidavit, he says that "At the Minister's Delegate Review the Officer told me that I was inadmissible due to serious criminality and was going to be issued a Deportation Order" (para 18). The MDR notes themselves make it clear that the Applicant answered "yes" when asked the following question:

> I will be reviewing this report as well as the supporting evidence. The purpose of this proceeding is to determine whether you shall be allowed to remain in Canada or if a removal should be issued against you.
>
> Do you understand?

[43] The Applicant also says in his affidavit before me that:

> 18. At the Minister's Delegate Review the Officer told me that I was inadmissible due to serious criminality and was going to be issued a deportation order.

> 19. While my actions which caused me to obtain a criminal record were out of character, nevertheless I accept full responsibility.

[44] The interview notes also indicate that the Applicant answered "yes" to the general question "Do you understand," and then went on to provide the following answers to the question "Is there anything you want to say with respect to the allegations?":

> I don't agree with the portion of the last statement in the report guilty of an indictable offence because I was convicted summarily.

[45] This evidence makes it obvious that the Applicant fully understood the nature of the proceedings and the contents of the report, and was able to make his position clear. This is consistent with the first MDR interview where, despite being told to bring an interpreter if he needed one, the Applicant attended with his counsel but without an interpreter.

[46] He now says before me that:

> 13. During the interview I told the Officer that my English was very weak and that I required an interpreter.
>
> 14. The Officer convinced me that my English was good and that I should proceed without an interpreter.

[47] This evidence is refuted by the MD who says in her affidavit that:

> 11. A new appointment date was set and a Notice to Appear was sent to the applicant and to his counsel. Again, the Notice to Appear instructed the applicant to being an interpreter if one was required. The Notice to Appear is dated September 8, 2016 The proceeding was scheduled for September 22, 2016. Attached as "Exhibit E" is a copy of the Notice to Appear.

> 12. On September 22, 2016, the applicant appeared at the proceeding. The applicant did not bring an interpreter and was not accompanied by counsel.
>
> 13. I have been informed that the Minister's Delegate Review form I completed at the September 22, 2016 review is included in his application record at pages 7-8. The information contained in the Minister's Delegate Review form reflects the information provided to me by the applicant during the review.
>
> 14. Whenever I begin an interview, I first ascertain whether the person requires an interpreter. The applicant did not indicate to me that he required an interpreter. If a person indicates to me that their English is weak, I will give them an opportunity to adjourn the proceeding so they may obtain an interpreter. The decision to do this is theirs. It is not in the interest of either party to proceed if the person concerned does not understand English. If I have a concern that the person does not understand me, does not understand the process, or I cannot communicate effectively with him or her, I will adjourn the proceeding until such time that the person can return with an interpreter.
>
> 15. I do not recall having difficulty communicating with the applicant. He indicated to me that he understood why he was attending, and he had previously attended an interview with me without the assistance of an interpreter. I did not try and convince the applicant to proceed without an interpreter. If the applicant had indicated he wanted an interpreter, the review would have been adjourned.

[48] The Applicant says I should prefer his evidence to that of the MD because the MDR notes indicate that the MD first of all checked the "yes" box and then crossed it out and check-marked the "no" box when he was asked the question "Do you require an interpreter?". The MD explains this as a clerical error:

> 17. I do not recall why I incorrectly checked the "yes" box next to the interpreter question on the form. I do see that I amended the response and applied my initials to the change. Contrary to the assertions at paragraph 18 of the applicant's Memorandum of Argument, the initials on the form are mine and not the applicant's. While I do not have an independent recollection of this change, I believe this was simply a clerical error.

[49] While the MD is not entirely precise on why this change occurred she is precise that "The Applicant did not indicate to me that he required an interpreter," and the preponderance of the evidence referred to above supports this. This evidence shows that the Applicant did not need an interpreter because he fully understood the process and the significance of the report and was fully able to provide comments on his position. The MD makes it clear in her affidavit that "I do have an independent recollection of the applicant and his case" and the "applicant did not indicate to me that he required an interpreter" and, if he had done so, or if there had been problems in communicating then, in accordance with the usual practice, she would have given the Applicant an opportunity to adjourn the proceedings to obtain an interpreter. As is usual in these cases, the MD's version is to be preferred because she has no reason to lie and her version is supported by the general evidence, including contemporaneous notes, that the Applicant fully understood the process and was able to make comments upon the report.

B. *Legal Counsel*

[50] The Applicant's argument on this point is as follows:

> 19. The Officer also erred in not allowing the Applicant to have legal counsel present at the Minister's Delegate Review. The Officer was aware that the Applicant had hired legal counsel, but that counsel had failed to show up. Thus, given the importance of the Minister's Delegate Review, coupled with the fact that it was at least questionable whether the Applicant understood the proceedings, the Officer should have again used an abundance of caution and postponed this review. The Officer did not, and in a perverse and capricious manner, without regard to the Applicant's understand of the proceedings, forged ahead of the Minister's Delegate Review.

[51] In his affidavit for this review application the Applicant swears as follows:

> 15. I told the Officer that I had retained a lawyer to assist me at the interview; however my lawyer did not show up.
>
> 16. The Officer told me that I did not need a layer and convinced me to continue with the Minister's Delegate Review.
>
> 17. I did not understand the full nature of these proceedings or everything that the Minister had said to me.

[52] For reasons given above, it seems to me that the evidence supports the view that the Applicant did understand the full nature of the proceedings. In oral argument before me, it appears he now takes the position that if he had had a lawyer present he might have been able to raise H&C factors that would have made a difference. I recently deal with this issue in *Llana Magnola Pompery v Canada (Minister of Citizenship and Immigration)*, 2016 FC 862:

> [40] The Minister's Delegate also made no reviewable error in making the exclusion order. As the Court made clear in *Rosenberry*, above:
>
> > [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, [2007] 1 F.C.R. 409 at paragraphs 35 and 37.
> >
> > [37] Nor was it necessary in the context of the admissibility decision or the request for an adjournment to consider issues relating to the practicability of removal. At the time the request was made, it would have been reasonable for the Minister's delegate to consider that in the event that removal orders were made against the applicants, the applicants would still be entitled to make a request under section 48 of the Act to stay their

> removal, at which point a pending H&C application and other factors relating the practicability of removal are often considered.

[41] The same point was made in *Lasin v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1356 [*Lasin*]:

> [19] The immigration officer only had to conclude, based on the facts that the applicant did not have the proper status in order to remain in Canada. The standard of review for this type of administrative fact finding decision is that of patently unreasonable. I am convinced that the immigration officer followed the process set out in the Act and made a reasonable determination.

[42] Even more recently, in *Eberhardt*, above, at para 55 (citing *Lasin*, above) and para 59, the Court has made it clear that "[t]he only question before the immigration officer in determining whether to issue the order, was whether the information regarding the applicant's inadmissibility was accurate."

[53] To avoid this jurisprudence, Applicant's counsel argued before me that, if legal counsel had been present, he could have asked for another adjournment so that the officer who wrote the report could consider H&C factors.

[54] It has to be borne in mind that the MD had already granted one adjournment so that the officer could consider legal objections raised verbally and in writing by the Applicant's previous counsel. There is no way the MD could have known that future counsel might be able to think up other legal issues, or that the Applicant might require additional time for this to occur. Having granted the adjournment so that the officer could address legal issues raised by Applicant's counsel, there was no obligation on the MD to ensure that legal counsel be present to raise other possible legal issues. The Applicant was told in the Notice of Appearance for the second MDR to bring counsel if he needed counsel. Counsel did not appear and the MD's evidence is clear that

the "Applicant did not ask me to adjourn the review to allow his counsel to attend" and, if he had, normal practice would have resulted in a re-scheduling of the hearing. Once again, the Officer's evidence is to be preferred. She makes it clear that she has "an independent recollection of the applicant and his case" and she has no reason to distort the facts. The Applicant, on the other hand, is not a neutral party and has a great deal riding on this application. As he points out in his affidavit "If I am forced to leave Canada everything that I have worked hard to accomplish will have been lost."

[55] The Applicant does not dispute his criminal conviction and he does not argue before me that the report on admissibility was wrong in law. He now takes the position that the presence of legal counsel might have resulted in some other legal objection to the report's conclusions. The Applicant has no absolute right to have legal counsel present (See *Canada (Minister of Public Safety and Emergency Preparedness) v Cha*, 2006 FCA 126 at paras 54-60) and, on the facts of this case, the preferable evidence is that he did not ask for an adjournment so that legal counsel could be present and his former legal counsel had every opportunity to make H&C factors, or any other legal argument, that might have assisted the Applicant. The fact that the Applicant has now changed legal counsel who feels that other submissions could have been made does not mean that the Applicant has been dealt with a procedurally unfair manner.

[56] I realize that the Applicant feels he has been treated unfairly. He says in his affidavit that the "Deportation Order that was issued was not fair and has caused me much anguish as I was prepared to start working in Canada and eventually apply for permanent residence." The fact is, however, that the deportation order was issued in accordance with Canadian law and the

Applicant has been convicted (albeit summarily) of an indictable offence. The Applicant chose to commit that offence and he even says in his affidavit that "I accept full responsibility." The immigration consequences of committing that offence are just as much the responsibility of the Applicant, even though he might not have known what they were when he chose to engage in criminal conduct in Canada.

[57] I can find no reviewable error with the Decision.

[58] Counsel concur that there is no question for certification and the Court agrees.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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