Federal Court  Cour fédérale

**Date: 20181129**

**Docket: IMM-758-18**

**Citation: 2018 FC 1201**

**Ottawa, Ontario, November 29, 2018**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**THAN SOE**

**Applicant**

**and**

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

**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 the Minister of Public Safety and Emergency Preparedness [Minister], dated January 27, 2018 [Decision], which refused the Applicant's application for Ministerial relief under former s 34(2) of the *IRPA*.

## II. BACKGROUND

[2] The Applicant, Than Soe, is a national of Myanmar (formerly Burma). As a young adult, he became involved with a variety of pro-democracy organizations in Myanmar.

[3] In a bid to bring the world's attention to the human rights abuses being perpetrated by the government of Myanmar, the Applicant and a friend hijacked a passenger plane departing from Myanmar. The Applicant and his accomplice used fake explosive devices and successfully had the plane diverted to Thailand. The devices were manufactured from laundry detergent boxes. One box was filled with laundry detergent while the other contained ammonium nitrate. No passengers were harmed during the hijacking. The Applicant was imprisoned for several years in Thailand for his role in the hijacking, but was eventually pardoned.

[4] The Applicant entered Canada in 2003 and made a claim for refugee protection the same year. The Applicant's refugee claim was suspended following the issuance of a section 44 report which alleged inadmissibility under s 34(1)(c) of the *IRPA*. The allegation of inadmissibility stemmed from the Applicant's role in hijacking the passenger plane in 1989.

[5] The Applicant's admissibility hearing was adjourned in 2004 to enable him to seek Ministerial relief under s 34(2) of the *IRPA*. The Minister of Public Safety and Emergency Preparedness denied relief to the Applicant on March 27, 2006. That decision was set aside by the Federal Court on April 30, 2007.

[6] On May 1, 2006, the Immigration and Refugee Board of Canada [IRB] deemed the Applicant inadmissible under s 34(1)(c) of the *IRPA*. That decision was upheld by the Federal Court on June 26, 2007.

[7] The Applicant's Pre-Removal Risk Assessment application was refused in May 2017, but Justice Kane, in *Soe v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 557 allowed his application for judicial review and returned the Pre-Removal Risk Assessment application for reconsideration by a different officer.

[8] The Canada Border Services Agency [CBSA] disclosed draft recommendations that Ministerial relief be denied in 2008, 2012, and most recently in July 2017. The Applicant provided additional submissions in support of his applications for Ministerial relief in each instance.

## III. DECISION UNDER REVIEW

[9] The CBSA issued a recommendation to the Minister on November 7, 2017 that relief under s 34(2) of the *IRPA* should be denied to the Applicant. In its recommendation, the CBSA examined the Applicant's involvement in political activities and organizations in Myanmar and paid specific attention to the Applicant's role in the hijacking of the airplane. At the same time, however, the CBSA noted the Applicant's argument that a singular focus on the hijacking would be an inappropriate basis for an analysis under s 34(2).

[10] The CBSA addressed the Applicant's various claims that it would be in Canada's national interest to grant him Ministerial relief. Firstly, the CBSA considered the Applicant's dedication to democratic values and his recognition that the hijacking was misguided. Secondly, the CBSA referenced letters of support written by community members, university educators, and the Applicant's former landlord. Finally, the CBSA considered the Applicant's argument that his presence in Canada is not a danger to public safety.

[11] The CBSA focused on the manner in which the Applicant had pursued his democratic values. Specifically, the CBSA concluded that the Applicant used terrorism to advance his aims. It found that the Applicant had committed himself to the hijacking despite the presence of significant risks. The CBSA relied on the Supreme Court of Canada decision in *R v Steele*, 2014 SCC 61 [*Steele*] in order to determine that the hijacking was a violent act notwithstanding the fact that the devices used could not explode. In *Steele*, the Supreme Court determined that the accused had committed an act of violence by robbing a store while claiming to have a firearm.

[12] The CBSA assessed the Applicant's argument that, because the devices were unable to explode, the hijacking was not a violent act of terrorism and commented that "it is troubling that he chose to include fertilizer (Ammonium Nitrate) within the contents, while previously having become aware via his studies that fertilizer could be used to build a bomb." The CBSA determined that, despite the inert nature of the devices, the Applicant had planned and committed a violent and dangerous act of terrorism by participating in the hijacking.

[13] The CBSA summarized its findings as follows:

> Mr. Soe's educational credentials, employment history, establishment in Canada, his lack of a criminal record in Canada, and the letters and petition of support he has provided, have all been considered. However, given the predominant considerations of national security and public safety related to this case, the CBSA submits that Mr. Soe has not demonstrated that his presence in Canada would not be detrimental to the national interest, and therefore, that relief is not warranted.

[14] The Minister denied relief to the Applicant on January 27, 2018.

## IV. ISSUES

[15] The issues to be determined in the present matter are as follows:

(1) What is the standard of review?

(2) Was the Minister's Decision reasonable?

(3) Did the Minister fetter his discretion?

## V. STANDARD OF REVIEW

[16] 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 [*Agraira*].

[17] The standard of review applicable to a decision of the Minister under s 34(2) is reasonableness (*Agraira*, above, at para 49). A significant degree of deference is owed to the Minister due to the discretionary nature of the decision. It is not for this court to reweigh the various factors assessed by the Minister in arriving at his decision (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 34).

[18] The issue of whether the Minister fettered his discretion does not fit neatly into either the standard of reasonableness or the standard of correctness. It is established law that fettering of discretion is a reviewable error which warrants setting aside the decision (*Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2 at page 6). No amount of deference will salvage a decision that results from the fettering of discretion. As stated by Justice Stratas in *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 (at para 24) "A decision that is the product of a fettered discretion must per se be unreasonable." It is sufficient to state that, regardless of the standard of review selected for this issue, a decision that is the product of fettered discretion will be set aside (*Barco v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 421 at para 20; *Gordon v Canada (Attorney General)*, 2016 FC 643 at para 28).

[19] 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 para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 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

[20] The following statutory provisions of the *IRPA* are relevant to this application for judicial review:

| **Security** | **Sécurité** |
|---|---|
| 34(1) A permanent resident or a foreign national is inadmissible on security grounds for | 34(1) Emportent interdiction de territoire pour raison de sécurité les faits suivants : |
| (a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests; | a) être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada; |
| (b) engaging in or instigating the subversion by force of any government; | b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force; |
| (b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada; | b.1) se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada; |
| (c) engaging in terrorism; | c) se livrer au terrorisme; |
| (d) being a danger to the security of Canada; | d) constituer un danger pour la sécurité du Canada; |

(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or

(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).

…

**Exception**

34(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

…

**Exception — application to Minister**

42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.

[Emphasis added.]

e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).

…

**Exception**

34(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt nationale.

…

**Exception — demande au ministre**

42.1 (1) Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, aux alinéas 35(1)(b) ou (c) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national.

[Je souligne.]

## VII. ARGUMENT

### A. *Applicant*

[21] The Applicant argues that the Minister's Decision was unreasonable on three primary grounds. Firstly, he says that the Minister misconstrued evidence related to the nature of the devices used in the hijacking. Secondly, he asserts that the Minister erred in law by focusing on the commission of the terrorist act rather than the proper analysis as set out in *Agraira*. Finally, he argues that the Minister fettered his discretion by declining to consider the standard of proof to be applied to the question of whether the Applicant committed a terrorist act.

[22] According to the Applicant, the Minister's conclusion on the devices used in the hijacking was "confusing and contradictory and inconsistent with the evidence." The Applicant focuses his argument on the apparent contradiction between the Minister's finding that the use of ammonium nitrate was "troubling" and the conclusion that the devices were inert.

[23] The Applicant argues that it was an error for the Minister to rely on the Supreme Court's decision in *Steele* in support of the conclusion that the Applicant committed an act of violence by hijacking the plane with fake explosives. The *Steele* decision is distinguishable because the Applicant never threatened to harm the passengers or pilots.

[24] The Applicant says that the Minister unreasonably focused on the hijacking when the appropriate focus should have been on the current and future threat to Canada posed by the Applicant.

[25] Finally, the Applicant argues that the Minister fettered his discretion by declining to consider which standard of proof to apply to the question of whether the Applicant committed a terrorist act. The Immigration Division determined that there were reasonable grounds to believe that the Applicant had committed an act of terrorism. This finding was upheld by the Federal Court in *Soe v Canada (Citizenship and Immigration)*, 2007 FC 671. According to the Applicant, the Minister fettered his discretion by declining to consider whether a different standard of proof should be applied.

B. *Respondent*

[26] The Respondent argues that the Minister's Decision was reasonable. The Respondent emphasizes the discretionary nature of the Decision as well as the Minister's entitlement to deference. The Respondent says that, when assessed in its entirety, the Decision falls within the range of reasonable outcomes.

[27] According the Respondent, the Minister's Decision was based on an assessment of a variety of factors, including the manner in which the hijacking was carried out. It was reasonable for the Minister to consider the use of ammonium nitrate in one of the devices used. It was also reasonable for the Minister to find that the use of a potentially incendiary substance heightened the gravity of the hijacking. This argument is supported by a United Nations High Commissioner for Refugees Advisory Opinion and the decision of Justice Fujimoto in the Applicant's 2003 Removal Proceedings (Applicant's Record at p 176) which found that the ammonium nitrate was potentially incendiary and increased the risk of harm to the passengers and crew.

[28] Additionally, the Respondent argues that it was reasonable for the Minister to conclude that the Applicant committed an act of violence by hijacking the airplane. It was reasonable to draw an analogy to the *Steele* decision in concluding that an act of violence can be committed even without a functioning weapon. In both instances, the threat of a weapon was used to coerce others into meeting demands.

[29] The Respondent says that the Minister did not err by failing to consider the future threat posed by the Applicant to Canada. Past jurisprudence has confirmed that consideration of past events and actions can be an appropriate method of assessing the current and future risk posed by an individual to Canada (*Afridi v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1299 at para 35; *Steves v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 247 at paras 53-54).

[30] Finally, the Respondent asserts that the Minister's analysis under s 34(2) is not the appropriate juncture to revisit the prior determination that the Applicant is inadmissible due to his commission of a terrorist act. The Respondent argues that neither statute or common law required the Minister to consider this question.

## VIII. ANALYSIS

[31] The gravamen of the Decision and the conclusions on the evidence are found in the following words:

> Mr. Soe has argued that he does not pose a threat or risk to Canadian society or national security, and put forth that the hijacking was a one-time occurrence, long ago, in protest of the

Burmese regime, its lack of respect for the democratic process, and its responsibility for human rights violations. He submitted that his conduct since arriving in Canada has been exemplary, that he does not have a criminal record, and that it is clear that he has adopted Canadian values, particularly with respect to democracy. As support, in his recent submissions he cited conclusions drawn on the issue of threat by the UNHCR, and the CBSA in producing its Restriction Assessment in 2013 (see attachment 15). However, a decision on whether to grant Ministerial relief is subject to a distinct legal test and is not limited to an assessment of current threat or risk. In this respect, it is significant that the SCC upheld the Minister's decision in *Agraira*, where the Minister's reasons did not refer to the issue of current or future threat. Similarly, the lack of a criminal record in Canada would not be a determinative factor. While Mr. Soe stated that he has embraced Canadian society and adopted Canadian values, it remains that he resorted to the extreme action of hijacking a passenger airliner in Burma to further his political goals, putting a number of innocent passengers and crew unnecessarily at risk of harm. The CBSA submits that Mr. Soe and accomplice acted in furtherance of his end goals in a manner which was, at a fundamental level, intrinsically dangerous and inherently irresponsible. Also, it should be noted that the CBSA Restriction Assessment concluded that "the nature and severity of [Mr. Soe's] acts do reach a particularly serious level of gravity" and that "the goal of inciting fear to exert control over the passengers and the crew cannot be disputed" (see attachment 15).

Mr. Soe's educational credentials, employment history, establishment in Canada, his lack of a criminal record in Canada, and the letters and petition of support he has provided, have all been considered. However, given the predominant considerations of national security and public safety related to this case, the CBSA submits that Mr. Soe has not demonstrated that his presence in Canada would not be detrimental to the national interest, and therefore, that relief is not warranted. Seeking political goals via the use of terrorism does not conform with Canadian values. As assessed above, he fully thought out, planned and participated in the dangerous action of hijacking a civilian airliner, while knowing of the potential dangerous or negative consequences of such action. These potential consequences, which had the possibility of occurring throughout various junctures (for example, during the act of securing control of the aircraft, or at the point where negotiations with the Thai authorities were occurring), ranged from his own execution at the hands of the authorities, to physical or emotional harm being caused to the many innocent parties present throughout the ordeal.

[32] It is clear that the "predominant considerations of national security and public safety" are the basis of the Decision, even though the Decision also says that "a decision on whether to grant Ministerial relief is subject to a distinct legal test and is not limited to an assessment of current threat or risk."

[33] At bottom, the Decision appears to say that the Applicant is a threat to national security and public safety because, long ago in his youth, he committed an act of terrorism: "Seeking political goals via the use of terrorism does not conform with Canadian values."

[34] After asserting that national security and public safety are the predominant factors considered, the Decision makes no determination of any threat or risk that the Applicant poses to public safety or national security. The rationale appears to be that the Applicant is a national security and public safety risk because, in his youth, he committed a single terrorist act and nothing that has happened since alleviates that risk.

[35] In my view, this reasoning lacks "justification, transparency and intelligibility" and is unreasonable.

[36] This matter has been proceeding since 2004 and I can find no evidence in the record to suggest that the Applicant poses any kind of risk or threat to national security or public safety. Yet the Minister says that this is the "predominant consideration in this case." I fully appreciate that the Minister's Decision is highly discretionary and that I cannot interfere, even if the facts could give rise to a different conclusion. However, it is a fundamental tenet of judicial review

that for a decision to be reasonable, it requires "the existence of justification, transparency and intelligibility." The Minister states his "predominant consideration" but then fails to say how anything the Applicant has done or might do poses any kind of threat to public safety and/or national security.

[37] I am entitled to look at the record to attempt to make sense of the Minister's conclusions in this regard. I have done so, and the record is clear that the Applicant poses no such threat. Apart from the hijacking itself, the record is highly positive in his favour. Hence, the Decision by its own terms, lacks justification, transparency and intelligibility. The Minister does not say that the hijacking itself and the conditions under which it look place are sufficient to deny the Applicant relief under s 34(2).

[38] We know from the Supreme Court of Canada decision in *Agraira*, above, that "national interest encompasses more than national security and public safety":

> [64] In my view, the Minister's interpretation of the term "national interest", namely that it is focused on matters related to national security and public safety, but also encompasses the other important considerations outlined in the Guidelines and any analogous considerations, is reasonable. It is reasonable because, to quote the words of Fish J. from *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, it "accords . . . with the plain words of the provision, its legislative history, its evident purpose, and its statutory context" (para. 46). That is to say, the interpretation is consistent with Driedger's modern approach to statutory interpretation:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (*Construction of Statutes* (2nd ed. 1983), at p. 87)

[39] Notwithstanding this guidance from the Supreme Court, the Minister says that national security and public safety are his "predominant consideration in this case." Yet there is no evidence of a national security or a public safety risk.

[40] The Minister's reasons are also unintelligible and unreasonable in other ways. Of great significance here is his treatment of the "false bomb" issue:

> A central point of Mr. Soe's testimony to Canadian officials (also reiterated in his Ministerial relief submissions), is that no actual weapons or violence were used in the process of commandeering the aircraft. What Mr. Soe put forth is that a certain sort of "false" bomb, which in effect had no capacity to detonate, was used by him and his accomplice in order to obtain compliance. Mr. Soe added that this "device" was essentially fashioned out of laundry detergent boxes, one which was filled with actual detergent, the other with fertilizer. He also submitted letters from the UNHCR and the lead Thai negotiator, General Sirisampan, stating that the device was either false or could not be detonated. However, if the intent of Mr. Soe were simply to fashion a device which was genuine in appearance rather than function, then logic would dictate that the purpose of the specific materials used within such a device (inside the detergent boxes) would be redundant. As Mr. Soe likely could have chosen among many other non-volatile materials for inclusion within the device, it is troubling that he chose to include fertilizer (Ammonium Nitrate) within the contents, while previously having become aware via his studies that fertilizer could be used to build a bomb, and therefore likely aware of the incendiary properties of such material. Mr. Soe therefore went beyond simply fabricating a close approximation of an explosive device, as he made sure to include functional material within the contents. Furthermore, Mr. Soe also noted that during his period of residence with the ADSB in the Thailand-Burma border region, an individual had been providing training in the use of weapons and explosives. Contrary to Mr. Soe's statements in his most recent submissions, the CBSA is not arguing that the "bomb" he used to obtain control of the aircraft was real or functional; only that it is clear that it contained components essential to producing an incendiary device; that he had previously obtained or had access to training in explosives; and that he was aware that fertilizer could be used to make a bomb - and that the use of real incendiary

> materials heightened the potential of harm to be caused during the hijacking.

[41] There is no evidence that the Respondent has pointed to, or that I can find in the record, that "the use of real incendiary materials heightened the potential harm to be caused during the hijacking." Ammonium nitrate may have "incendiary properties" but, as the Minister concedes "the CBSA is not arguing that the 'bomb' he used to obtain control of the aircraft was real or functional." If it was not "real or functional" then the statement that the use of fertilizer "heightened the potential for harm," is not intelligible. The fact that ammonium nitrate could be used to make a bomb that could heighten the potential for harm does not mean that such occurred in this case, and the facts are clear that it did not.

[42] This is an important factual error because, without some explanation of how "national security and public safety concerns" arise on the facts of this case, the Decision would have to rest on the hijacking itself and the immediate facts surrounding that event. An important fact is that the bomb was false and could not be detonated. And there is no evidence that the use of ammonium nitrate "heightened the potential of harm" with this false bomb.

[43] The Applicant has raised other issues, but I think the errors set out above are sufficient to render the Decision unreasonable. As Justice Phelan said in *Soe v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 461, an applicant is entitled to know the real reasons for the Minister's refusal to exercise his discretion under s 34(2). Based upon this Decision, it is still unclear why the Minister is refusing to exercise his discretion in the Applicant's favour for an isolated act against a highly oppressive regime under s 34(1) that occurred in 1989 when the

Applicant was a young and idealistic man with no connections to any terrorist organization, and when the whole subsequent record is highly favourable to the Applicant and shows that he poses no real threat to national security or public safety. There may be an answer to this question, but the Minister has not yet stated it.

[44] Given the basis for my conclusions, I don't think either side has raised an issue that requires me to certify a question.

**JUDGMENT IN IMM-758-18**

**THIS COURT'S JUDGMENT is that**

1. The application is allowed. The Decision is quashed and the matter is remitted to the Minister for redetermination.

2. No question is certified.

"James Russell"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **STYLE OF CAUSE:** | THAN SOE v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
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| **JUDGMENT AND REASONS:** | RUSSELL J. |
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