Federal Court  Cour fédérale

Date: 20250625

Dockets: IMM-593-23
IMM-12744-22

Citation: 2025 FC 1148

Ottawa, Ontario, June 25, 2025

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

Latifou Olatoun FASSASSI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant Latifou Olatoun Fassassi is a citizen of Benin. Having arrived in Canada at 18 years old in 2004, he has resided here as a permanent resident all his adult life.

[2] Mr. Fassassi was convicted in late 2020 of two counts of sexual interference and two counts of sexual assault (all by indictment) under sections 151 and 271 of the *Criminal Code*. At sentencing, the convictions for sexual assault were stayed and he subsequently received a seven-year sentence. His counsel advised the Court at the hearing of this matter that Mr. Fassassi has been granted parole already. I also note that a publication ban is in place regarding the identity of the victims in the criminal proceedings.

[3] After Mr. Fassassi's convictions (*R v Fassassi*, 2020 ONSC 7403) and sentencing (*R v Fassassi*, 2021 ONSC 3863), a report was prepared under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The brief report expresses the opinion that Mr. Fassassi is inadmissible by reason of serious criminality pursuant to paragraph 36(1)(a) of the *IRPA*. See Annex "A" below for relevant legislative provisions.

[4] The Inland Enforcement Officer of the Canada Border Services Agency [CBSA] who prepared the subsection 44(1) report subsequently conducted an interview with Mr. Fassassi while he was incarcerated. Mr. Fassassi was given an opportunity to make further submissions and to provide supporting material. The Inland Enforcement Officer then prepared an A44 narrative report, recommending an admissibility hearing. The Reviewing Officer (i.e. the Respondent Minister's Delegate) agreed and prepared the necessary referral under subsection 44(2) of the *IRPA*, along with Minister's Delegate Notes.

[5] Mr. Fassassi asserts that, in connection with the admissibility proceeding before the Immigration Division [ID] of the Immigration and Refugee Board of Canada, he learned of

extraneous reports on which the Minister's Delegate [MD] relied in making the referral, which reports Mr. Fassassi says should have been disclosed to him. In these judicial review applications, he challenges the referral under subsection 44(2), as well as the ID decision.

[6] The judicial reviews raise issues of procedural fairness in respect of the MD's reliance on extraneous reports, the reasonableness of the referral to the ID, and the reasonableness of the ID decision itself and, more specifically, whether the ID has jurisdiction to consider an asserted breach of procedural fairness in the referral of a subsection 44(1) report.

[7] Having considered the parties' written material and heard their oral submissions, I find that Mr. Fassassi has not satisfied me that procedural fairness was breached nor that either the referral or the ID decision was unreasonable. For the reasons explained below, these judicial review applications thus will be dismissed.

II. Analysis

A. *Did the use of extraneous reports that were not disclosed to the Applicant breach his right to procedural fairness?*

[8] Mr. Fassassi takes issue with the MD's reliance on the "Inland Officers [*sic*] report and CSC [Correctional Services Canada] reports dated 14 and 17 October 2021." He asserts that because these reports were not provided to him before the ID hearing, this resulted in procedural unfairness. I disagree.

[9] I start the analysis of this issue by noting that questions of procedural fairness attract a correctness-like standard of review: *Benchery v Canada (Citizenship and Immigration)*, 2020 FC 217 at paras 8-9; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 77. The focus of the reviewing court is whether the process was fair and just in the circumstances: *Chaudhry v Canada (Citizenship and Immigration)*, 2019 FC 520 at para 24.

[10] Further, just weeks prior to the hearing of the instant matters, this Court confirmed that "the challenge to what is accomplished pursuant to s 44 of the IRPA must be by way of an application for judicial review before our Court" (as opposed to before the ID, which is addressed further below): *Ismail v Canada (Citizenship and Immigration)*, 2025 FC 232 at para 27.

[11] The procedural fairness issue raised by Mr. Fassassi relates to the fairness of the process employed by the CBSA Officers and whether his opportunity to respond to the substance of the inadmissibility allegations was hampered by the Officers. This Court has confirmed that such participatory rights are contained within the duty of procedural fairness: *XY v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 831 at para 30 (citing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at para 22).

[12] That said, the Federal Court of Appeal has characterized the process of preparing inadmissibility reports under subsections 44(1) and 44(2) of the *IRPA*, further to section 36, as a "fact-finding mission," noting that the "[p]articular circumstances of the person, the offence, the

conviction and the sentence are beyond their [the Minister's delegates'] reach": *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 at para 35.

[13] The duty of fairness in the context of section 44 reports is not at the high end of the spectrum; for a permanent resident, the degree of fairness owed is somewhat higher than in the case of a foreign national. Further, there is no duty to provide the person concerned with the subsection 44(1) report (including the narrative) prior to the subsection 44(2) referral decision. To do otherwise would entail permitting the person to make further submissions (apart from those already provided before the referral is made). The purpose of the disclosure, however, is to permit the person to know the case they have to meet before the ID, and not to make additional submissions before the Minister or the Minister's delegate(s): *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 [*Sharma*] at paras 27, 29-30.

[14] It is enough to meet the duty of fairness by informing the person of the facts that triggered the section 44 process, giving the person an opportunity to present evidence and make submissions, to participate in an interview after being told of the purpose for the interview and of the possible consequences, offering the person the possibility of seeking assistance from counsel, and giving the person a copy of the report before the admissibility hearing: *Sharma*, above at para 34. Mr. Fassassi has not shown the Court that these minimal steps did not occur.

[15] Here, the Inland Enforcement Officer interviewed Mr. Fassassi on January 26, 2022 at Collins Bay Minimum Institution, where he was incarcerated. According to the A44 narrative, the Officer advised Mr. Fassassi of his right to counsel and noted that Mr. Fassassi chose to

participate in the interview without counsel present. I pause to note that, in connection with the judicial review of the referral decision, Mr. Fassassi's counsel repeatedly mentioned that Mr. Fassassi was unrepresented at that time. This does not appear to be correct on the face of the A44 narrative which describes that when the Officer asked Mr. Fassassi if he wanted to discuss the offences, he was hesitant and advised that he would prefer to discuss with his lawyer prior to speaking about the offences and would address them in his written submissions. In my view, not only does this description contradict counsel's assertion that Mr. Fassassi was unrepresented *per se* (as opposed to his lawyer not being present at the interview) but it also confirms he understood he would have an opportunity to make written submissions following the interview, as mentioned next.

[16] Mr. Fassassi was provided with a letter of the same date as the interview informing him that a report has been or may be prepared under subsection 44(1) of the *IRPA* on the basis that he may be inadmissible to Canada because of serious criminality under paragraph 36(1)(a). The letter also invited Mr. Fassassi to make submissions on non-limited factors that would be considered in the decision-making process. In addition, the letter indicated that Mr. Fassassi would not have a right to appeal to the Immigration Appeal Division if he were found inadmissible (because the crimes for which he was convicted entailed sentences of at least six months). It also informed him of the possibility of applying for a pre removal risk assessment or to the Federal Court for judicial review. Mr. Fassassi made responding submissions and provided several letters in support.

[17] Regarding the timing of Mr. Fassassi's receipt of the referral decision, the Application for Leave and Judicial Review in Court File IMM-593-23 indicates that he was notified of the referral under cover of letter dated May 31, 2022 and received it on or about June 10, 2022. The May 31, 2022 letter describes attachments as "Minister's Disclosure and Request for Admissibility Hearing." The Applicant's Application Record contains the affidavit of Ogo Esenwah, a legal assistant in Mr. Fassassi's counsel's office. Paragraph 7 of the affidavit states that the Minister's disclosure contained the subsection 44(1) report and the subsection 44(2) referral, among other documents. What those other documents encompassed is not stated.

[18] That said, the affidavit of Ogo Esenwah concedes that, through his counsel, Mr. Fassassi was served on August 21, 2023 (i.e. almost three months prior to the ID hearing) with the reasons for the MD's decision (i.e. the MD's Notes) to refer the matter to the ID for an admissibility hearing. The Notes, which summarize the A44 narrative, refer to the October 14 and 17, 2021 CSC reports. The A44 narrative report indicates that Mr. Fassassi was aware of his correctional plan, i.e. the October 14, 2021 CSC report, and the recommended rehabilitation programming.

[19] The MD refers to these reports in the context of the discussion about Mr. Fassassi's remorse, or lack, and responsibility for the convictions. I note that, in connection with the sentencing decision, Justice Monahan commented on Mr. Fassassi's lack of remorse as a reflection of the absence of mitigating circumstances (see *R v Fassassi*, 2021 ONSC 3863 at para 50). In other words, notwithstanding that the CSC reports are not contained in the record, they

were not the only source of information about the lack of remorse. In my view, this is clear on the face of the A44 narrative report.

[20] Although the affidavit of Ogo Esenwah suggests that Mr. Fassassi was not provided with the reasons for refusing his post-interview submissions (i.e. the A44 narrative report) prior to the ID hearing and only became aware of them during the hearing, this Court previously has held that the failure to give an applicant a copy of the narrative report is not necessarily a reviewable error: *Gonzales v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 10 [*Gonzales*] at paras 32-33. Here, given Mr. Fassassi's awareness of his correctional plan and the recommended rehabilitation programs (i.e. the October 14, 2021 CSC report), the CSC reports were documents the Minister reasonably could expect Mr. Fassassi to have or, I add, to have available to him: *Gonzales*, above at para 35.

[21] Further, I agree with the Respondent that the MD's Notes here (i.e. the reasons for the MD's referral decision) stand alone; the A44 narrative report simply serves, in my view, to support otherwise sufficient reasons for the referral that include, in any event, a summary of the A44 narrative report*: Burton v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 753 at para 17. My determination in this regard is based on the applicable MD's Notes and are not intended as a general proposition that a Minister's delegate's notes suffice in all cases to permit the person to know the case they have to meet before the ID.

[22] More to the point, Mr. Fassassi has not shown to the Court's satisfaction how he was prejudiced by not having received the A44 narrative report prior to the ID hearing, assuming that

was the case. Contrary to Mr. Fassassi's submission that the referral to the ID represents a quasi-judicial decision, the Federal Court of Appeal opines the opposite in *Sharma* (at para 22): "an officer's decision under subsection 44(1) and the Minister's decision under subsection 44(2) bear none of the hallmarks of a judicial or quasi-judicial decision." As mentioned above, they are fact-finding exercises, involving little, if any, discretion.

[23] For the above reasons, I am not persuaded that there has been a breach of procedural fairness warranting the Court's intervention.

B. *Did the Minister's Delegate unreasonably refer the section 44 report to the ID?*

[24] I find that Mr. Fassassi has not met his burden of showing the MD's decision to refer the matter to the ID for an admissibility hearing was unreasonable in the sense of failing to exhibit the hallmarks of contextual justification, transparency, and intelligibility: *Vavilov*, above at paras 99-100, 106.

[25] In particular, I determine that Mr. Fassassi has not demonstrated a fundamental misapprehension or failure on the part of the MD to account for evidence that could render the referral unreasonable. For example, Mr. Fassassi takes issue with the MD's finding that he is not a "Long Term Permanent Resident." In my view, nothing turns on this characterization, or lack of it. The MD was aware that Mr. Fassassi came to Canada at the age of 18 and spent the majority of his life here. Further, the two manuals at issue — *ENF 5: Writing 44(1) Reports* and *ENF 6: Review of reports under subsection 44(2)* — both formerly described that the designation "long-term permanent resident" is not part of the *IRPA* nor its Regulations, but rather the term

was defined in previous policy which is not binding on the Court (see also *Sharma*, above at para 27).

[26] As another example, Mr. Fassassi takes issue with having been asked about what he says are extraneous matters during the interview, namely, the circumstances of his convictions and the potential harms he might face if removed to Benin. This Court previously has stated, however, it is "not feasible to expect the CBSA Letter to have provided a comprehensive list of each supporting document" an applicant could submit, and further, an applicant is "required to put [their] best evidence and arguments forward in [their] written submissions": *Slemko v Canada (Public Safety and Emergency Preparedness)*, 2020 FC *718* at para 35; *Harms-Barbour v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 59 at para 60.

[27] I refer in this regard to the January 26, 2022 letter the Inland Enforcement Officer provided to Mr. Fassassi contemporaneously with the interview. Although the letter does not mention the above matters specifically, the enumerated factors are non-limited and, thus, it was open to Mr. Fassassi, in my view, to make submissions on these points. Because he chose not to do so, the MD, whose decision summarizes and relies on the A44 narrative report, cannot be faulted for giving reasons that are responsive to his submissions, including by mentioning what he did not address further.

[28] In addition, I agree with the Respondent that a Minister's delegate's discretion is narrow, especially in cases of serious criminality, and the process contemplated by subsections 44(1) and 44(2) ultimately is "only meant to look into readily and objectively ascertainable *facts*

concerning admissibility" (emphasis in original): *Sidhu v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1681 [*Sidhu*] at para 60, citing *Obazughanmwen v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 151 at para 37, leave to appeal refused, 2024 CanLII 35280 (SCC).

[29] Insofar as Mr. Fassassi's post-interview submissions are concerned, I observe that the MD is presumed, unless the contrary is shown, to have considered them. Nor is there any obligation on the MD to mention all of them: *Basanti v Canada (Citizenship and Immigration)*, 2019 FC 1068 at para 24; *Miranda Martinez v Canada (Citizenship and Immigration)*, 2025 FC 416 at para 27.

[30] The MD's Notes refer to Mr. Fassassi's undeniable supports, his children in Canada, and adjustment upon returning to Benin, and show that the MD weighed the humanitarian and compassionate [H&C] factors against the convictions and their aggravating factors. The Notes conclude that subsection 44(1) report is well-founded and, in the absence of compelling H&C factors, a referral was issued under subsection 44(2) of the *IRPA*.

[31] Mr. Fassassi seemingly challenges the weight assigned to the factors that were mentioned. It is not the Court's role on judicial review, however, to reweigh and reassess the evidence: *Vavilov*, above at para 125. Further, noting that the Court must not hold the MD to the standard of perfection, the Notes demonstrate, in my view, sufficient consideration of the H&C factors, including requisite balancing: *Vavilov*, above at para 91.

[32] Finally, Mr. Fassassi's submission that the MD should have conducted a forward-looking assessment of how he can be reintegrated into society, including the inherent risks and mitigating factors, is not supported by the jurisprudence, in my view. As stated by Chief Justice Crampton, the position that "forward-looking considerations trump the seriousness of the offence(s) in question is inconsistent with the scheme of the *IRPA*, particularly the objective set forth in paragraph 3(1)(i)": *Sidhu*, above at para 90.

[33] Although the MD was under no obligation to consider the H&C factors, having done so, I am satisfied that the reasons demonstrate a logical chain of analysis and are justified, transparent and intelligible in the context of the factual and legal constraints applicable to this matter: *McLeish v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 705 at para 8.

C. *Does the ID have jurisdiction to consider an asserted breach of procedural fairness in connection with the referral of a subsection 44(1) report?*

[34] Noting that that facts captured in the subsection 44(1) report were not contested before the ID, I find that the ID reasonably concluded that it has no discretion to consider H&C factors and the asserted breach of procedural fairness in the referral process which, in the ID's view, would be for the Federal Court to consider and determine. The ID's conclusion is supported by paragraph 45(d) of the *IRPA*: *Sharma*, above at paras 19, 24.

[35] Mr. Fassassi has not shown that *Sharma* no longer is good law. To the contrary, it remains binding precedent on this Court, and has been followed by the Court in determining that

the ID's jurisdiction is limited. See, for example, *Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 at para 53; *Gonzalez*, above at para 32; *Ismail*, above at paras 61-62.

[36] Mr. Fassassi has not provided any convincing arguments that persuade me otherwise.

III. Conclusion

[37] For the above reasons, I conclude that the section 44 referral process was not procedurally unfair, and that Mr. Fassassi has not met his burden of showing either the referral decision or the ID decision was unreasonable. Both judicial review applications thus will be dismissed.

[38] Neither party proposed a serious question of general importance for certification. I find that none arises in the circumstances.

JUDGMENT in IMM-593-23 and IMM-12744-22

THIS COURT'S JUDGMENT is that:

1. These judicial review applications are dismissed.

2. There is no question for certification

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27.**
***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27.**

Objectives — immigration **3 (1)** The objectives of this Act with respect to immigration are […] **(i)** to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and […]	**Objet en matière d'immigration** **3 (1)** En matière d'immigration, la présente loi a pour objet : […] **i)** de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité; […]
Serious criminality **36 (1)** A permanent resident or a foreign national is inadmissible on grounds of serious criminality for **(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;	**Grande criminalité** **36 (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants : **a)** être déclaré coupable au Canada d'une infraction prévue sous le régime d'une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction prévue sous le régime d'une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
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	**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

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.	étranger; il peut alors prendre une mesure de renvoi.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-593-23 AND IMM-12744-22
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