Date: 20080429

Docket: IMM-2075-07

Citation: 2008 FC 547

Ottawa, Ontario, April 29, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

BABAK SIAMAK SALEHIAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is a case where Canada found the Applicant to be a genuine refugee because of the torture experienced in his home country but when the psychological effects of that torture manifested itself as anti-social behaviour, Canada sought to return the Applicant to the very place of that torture.

[2] This is the judicial review application of a "Danger Opinion" rendered under s. 115(2)*(a)* of the *Immigration and Refugee Protection Act* that found the Applicant to be a danger to the public in Canada.

II. BACKGROUND

[3] Mr. Salehian is a Convention refugee from Iran and was granted that status in October 1998. He has no family in Canada. He was convicted of several criminal offences and found to be a danger to the public by the Minister's Delegate on April 10, 2007.

[4] Originally, the Applicant was an Iranian Kurd living in Mahabad until 1997.

[5] From 1994 until he left Iran, the Applicant was a member of the Democratic Republic of Kurdistan, active in the city of Mahabad.

[6] From June 1995 until May 30, 1996, the Applicant was detained in prison in Mahabad and another city, Ouromiech, because of his political activities. During his imprisonment, he was interrogated, beaten and tortured.

[7] After his release from detention, Mr. Salehian continued his political activities but was ultimately forced into hiding and had to flee the country in 1997. He claimed and was granted refugee status in 1998 on the basis of the political persecution and torture that he had experienced.

[8] Even before his arrival in Canada, the Applicant began developing his criminal record. On the flight to Canada he grabbed a female passenger; he later claimed that he had been intoxicated but he pled guilty to sexual assault.

[9] Since that time he has been convicted of robbery, assault, failure to comply with court orders and of uttering death threats.

[10] In the latest incident in 2006, while on bail for a charge of threatening death, he attacked a TTC driver. The arresting officers determined that a Mental Health Assessment was necessary because the Applicant was disjointed in his conversation. He received a lengthy sentence, on the basis of a joint submission, so that he could receive treatment for his mental health issues.

[11] As manifested by his criminal record, the Applicant has serious mental health issues commencing with a suicide attempt in 1999. He has been hospitalized on several occasions for psychiatric treatment.

[12] The Applicant is currently residing in the St. Lawrence Valley Correction and Treatment Centre in Brockville. During much of his time in Canada, the Applicant has lived with friends, in shelters or in rooming houses, struggling with his psychiatric problems and with his alcohol addiction.

[13] The Applicant had, prior to being tortured, never suffered from depression. After that incarceration and torture, he became mentally ill and an alcohol abuser – his first drink of alcohol was on his flight to Canada. The medical evidence is consistent that the Applicant suffers from mental health disorders and alcoholism directly related to the torture he suffered.

[14] All of this evidence was before the Minister's Delegate. As part of the record before the Minister's Delegate, the Applicant filed a community treatment plan, which was endorsed by the attending psychiatrist. In the opinion of that psychiatrist:

> "[…] with adequate ongoing psychiatric treatment and support Mr. Salehian's prognosis is good. With abstinence from alcohol, there is no evidence of him posing a danger to himself or others.
>
> […]
>
> It is my view that the community treatment order being drafted will allow Mr. Salehian to be released in a manner which optimizes his care and minimizes risk. This plan will ensure that he remains in psychiatric treatment, lives in a supervised setting, complies with medication and treatment and abstains from alcohol."

[15] With respect to the issue of the danger that the Applicant faces if returned to the country of torture, there were numerous traditional sources of information, such as U.S. DOS Reports and Amnesty International Reports, all evidencing repression in Iran and targeting of Kurds, particularly those who are politically active against the government.

[16] In addition to this evidence, there was direct evidence from Iranians in Canada, a journalist and a publisher, both of whom follow issues in Iran. Their evidence is with respect to the likelihood

of further incarceration, torture, and danger due to past political activities, and the suspicion – not just the mere "interest" - of Iranian authorities regarding returning citizens.

[17] The Minister's Delegate was not satisfied, based on past history, that the Applicant would comply with the community treatment plan. The Minister's Delegate concluded that there was no independent corroboration that the Applicant had participated in activities that could lead to persecution. Lastly, the Minister's Delegate concluded that the only consequence of his return to Iran is that the Applicant might be questioned upon arrival, as is the case with other returnees.

III. ANALYSIS

[18] The consequences of a Danger Opinion are serious as they result in the removal of the protection from *refoulement*. *Refoulement* is contrary to the Convention Against Torture to which Canada is a party and generally prohibited by Canadian law and admonished in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.

[19] Prior to *Dunsmuir v. New Brunswick*, 2008 SCC 9, the standard of review for a Danger Opinion was patent unreasonableness. That standard has now been discarded by the Supreme Court in favour of "reasonableness". Reasonableness takes into account several factors including the expertise of the decision maker. In my view, a consideration of the factors in a reasonableness analysis is not an invitation to the Court to return to a "patent unreasonableness" standard under another guise. At the end of the day a court must be satisfied with the reasonableness of the decision.

[20] Despite the generally thorough review conducted by the Minister's Delegate, the decision is infirmed in three areas and cannot stand the test of "reasonableness".

A. *Community Treatment Plan*

[21] The Minister's Delegate considered the community treatment plan as one of voluntary compliance and concluded, given his history, that the Applicant would not voluntarily comply. Had the Minister's Delegate been faced with a plan or order like those of the past, his conclusion would have been at least reasonable. However, he was faced here with a different fact scenario. His analysis missed the compulsory nature of the community treatment plan and failed to take into account the consequences for non-compliance.

[22] In addition, there was independent expert psychiatric evidence from Dr. Cameron at the Brockville facility as to the effectiveness of the plan and his opinion that it would work in respect of this Applicant. The Minister's Delegate had no evidence to the contrary, but nevertheless concluded that the plan would not be effective, failing to consider its compulsory nature. The Minister's Delegate has no established expertise in the treatment of addiction or of the success of various treatments. Therefore, the opinion of the Minister's Delegate has no reasonable basis.

B. *Independent Corroboration*

[23] The Minister's Delegate indicated that there was no independent corroboration or indication that the Applicant participated in any activities that would support a finding that he faced a reasonable chance of persecution. It is difficult to square this conclusion with the Immigration and Refugee Board's conclusion that the Applicant was a Convention refugee because he had been tortured and persecuted for his political activities.

C. *Risk of Torture*

[24] In *Suresh*, the Supreme Court set out a number of factors to consider in assessing whether deportation would result in *refoulement* to torture. These included the human rights record of the country, the personal risk faced, any assurances that a deportee would not be tortured, the worth of the assurances and the ability of the state to control its own security forces.

[25] The only risk the Minister's Delegate foresaw was that the Applicant would be questioned as a returning Iranian. While the Minister's Delegate may disagree with the weight of the evidence from other sources, he must explain how he reached that conclusion – the Minister's Delegate did not.

[26] There were two specific pieces of evidence as to the Applicant's risk, that of the journalist and of the publisher, yet no mention is made of that evidence. While it is trite law that a decision maker does not have to mention every piece of evidence considered, the more important the

evidence, the more that evidence addresses the issue on which the decision maker disagrees, the greater the necessity to explain the reason for rejecting that evidence.

[27] As stated earlier, the results of the Danger Opinion is to strip the Applicant of the protection of Convention refugee status and subject him to *refoulement* to torture. Given this fact, it was incumbent on the Minister's Delegate to address evidence which is weighty, current and goes to the very root of the decision.

IV. CONCLUSION

[28] For the reasons above, this Danger Opinion cannot stand the test of reasonableness. It must therefore be quashed and the matter referred to a different delegate for a new assessment, including the ability to consider new or more current evidence in addition to the existing record.

[29] Given the reasons for this decision, which are the application of the specific facts to accepted principles of law, there is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the Danger Opinion is quashed and the matter is to be referred to a different delegate for a new assessment, including the ability to consider new or more current evidence in addition to the existing record.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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