

Date: 20080728

Docket: IMM-5319-07

Citation: 2008 FC 918

Ottawa, Ontario, July 28, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**MARLIN MITCHELL
and MAKIDA MITCHELL
(by her litigation guardian Marlin Mitchell)**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION and
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Mitchell is a citizen of Grenada. She came to Canada as a visitor in September 2000. When her visa expired six months later she did not leave. In November 2007, she met with Mr. MacDonald Scott, an immigration consultant, who advised her that she might have a claim for refugee status when she told him that she left Grenada due to the domestic violence she had experienced there. Another appointment with the consultant was to be arranged in order to assess the strength of her claim and for the consultant to explain the process to her. Prior to that meeting

taking place, she and her young daughter were detained when a store employee believed she had been shoplifting. The Toronto police were called but no charges were ever laid. However, the Toronto police did contact the immigration authorities concerning Ms. Mitchell while she was in their custody, as it appeared she had no status in Canada.

[2] The immigration authorities arrested and detained Ms. Mitchell under section 55 of the *Immigration and Refugee Protection Act*, S.C. 2001, on December 4, 2007. A report was prepared by the Immigration Officer who detained Ms. Mitchell (the “Section 44 Report”). The Officer concluded that Ms. Mitchell was inadmissible to Canada as she had overstayed her visitor’s visa. Following procedure, the Minister's Delegate reviewed the Section 44 Report and interviewed Ms. Mitchell. Following that review and interview, the Delegate issued a removal order.

[3] Ms. Mitchell asserts that the Delegate issued the removal order in breach and in denial of her stated desire to make a refugee claim. Alternatively, she asserts that section 99(3) of the Act, which prohibits the making of a refugee claim after a removal order has issued, offends section 7 of the *Canadian Charter of Rights and Freedoms* and is unconstitutional.

[4] There is a significant difference between the parties as to what occurred and what was said during Ms. Mitchell’s detention by the immigration authorities. Affidavits from Ms. Mitchell, Mr. Scott, the Officer and the Delegate were filed and each affiant was vigorously cross-examined by counsel. Portions of the cross-examination were referenced by both parties during the hearing of

this application and, as agreed, I have read the entire transcripts. Because of the dispute between these parties, it is necessary to set out the material facts alleged by each.

APPLICANTS' EVIDENCE

[5] Ms. Mitchell states that she was referred to Mr. Scott by Access Alliance, an agency that was assisting her. She met with him in November 2007. She told him that her reason for leaving Grenada was domestic violence and he told her that she may have a refugee claim. She states that she was to have another appointment with Mr. Scott to assess the strength of her claim and so he could explain the process to her. However, before she could meet with him the second time, she was detained by the police and the immigration authorities.

[6] In her affidavit she raises no claims with respect to her dealings with the Officer. On cross-examination she recalls that the Officer told her that she had a right to contact the Grenada government: apparently a reference to her Vienna Convention rights. She states that he did not tell her that she had a right to speak to a lawyer or a representative nor did she say that she wanted to speak to counsel. She testified: "At the present time, I didn't think I need a lawyer".

[7] She attests that on Friday, December 7, 2007, she met with the Delegate. Ms. Mitchell states that the first question the Delegate asked was whether she had a lawyer. She said that she did, gave her Mr. Scott's name, and said that she wished to speak to him. She states that the Delegate told her that she was only going to ask basic questions and that "she didn't really need a lawyer". In cross-examination, Ms. Mitchell expanded on this, saying that when she told the Delegate that it

would be 15 minutes before Mr. Scott could arrive, the Delegate said that would be too late and she wanted only to ask basic questions. She further says that she told the Delegate “I have a right to talk to him” and that she informed her that while she did not know his phone number she could contact Access Alliance and they could reach him. Again, she says that the Delegate said that she did not need a lawyer.

[8] Once the formal meeting with the Delegate started, Ms. Mitchell recalled being asked her name and date of birth “and then I tell her I want to file refugee [claim]” and that she was afraid for her life because she had been in a controlling relationship with her boyfriend. She asserts that the Delegate replied “It’s too late for that” as she had started the paperwork.

[9] After 20 minutes of questioning she was given the Section 44 Report and the removal order which, when asked, she signed. She was then given a document that informed her of her right to file a judicial review application.

[10] In her affidavit she states that she immediately went to see Mr. Scott after her release although in her cross-examination she testified that after her release she contacted Access Alliance and was told that she should book an appointment with Mr. Scott, and that she called him and set an appointment.

[11] Mr. Scott’s affidavit and evidence in cross-examination confirms that the two met first in November and that she had been referred to his office for a free consultation by Access Alliance.

He recalls informing her of the possibility that she might file a refugee claim. He asked her to bring her documents when she returned for her next appointment. He attests that he gave her his business card and told her that she should call him if she was picked up by Citizenship and Immigration Canada. The next he heard from her was after her release by immigration authorities. She came to his office the day after her release, with no appointment, and informed him of what had happened. He states that he asked her whether she had told the officer who interviewed her that she was afraid to return to Grenada and attests that “the Applicant made it clear to me that she told the Officer at the first opportunity that she was at risk in Grenada, and could not return there”.

RESPONDENT’S EVIDENCE

[12] The Officer attests that when he met Ms. Mitchell at the police station he informed her of her rights under the Vienna Convention and her right to counsel. The form he signed indicating that this advice had been given to Ms. Mitchell was not signed by her, although it has a line for the detainee’s signature. His explanation on cross-examination was that it was probably an oversight on his part not to get her signature. On cross-examination he testified that he asked her, as he routinely does, whether she wanted to call anyone – whether she had anyone representing her whom she wished to call. He states that she provided no information with regards to any representative.

[13] The Delegate states in her affidavit that the first question she asked Ms. Mitchell was whether she required an interpreter. Her questions followed those in the Minister’s Delegate Review form and she wrote the material responses from Ms. Mitchell on that form. The next question on the form is “Is counsel present?”. The Delegate stated that she advised Ms. Mitchell

that she had a right to have counsel at the interview, that she was going to be asking questions about the Section 44 Report to determine its validity “and that it was not necessary to have counsel present”. She testified that Ms. Mitchell said that she wished to proceed without counsel.

[14] After confirming the accuracy of the details in the Section 44 Report, the Delegate asked Ms. Mitchell why she didn't leave Canada when she was supposed to leave. Her note on the form and her evidence is that Ms. Mitchell said that she had gotten to like it so she decided to stay. She asked Ms. Mitchell if she had any questions and Ms. Mitchell said that she had none.

[15] Then she asked the last question on the form – “Do you fear returning to Grenada for any reason?”. The Delegate testified that Ms. Mitchell said that she had no fear of returning to Grenada and the Delegate wrote down that response on the form. On cross-examination she denied that Ms. Mitchell ever stated that she had any fear of returning to Grenada. She further denied that Ms. Mitchell ever said that she wished to make a refugee claim. The Delegate prepared the removal order and had Ms. Mitchell sign it.

[16] The Delegate testified on cross-examination that as Ms. Mitchell was leaving the interview room “she mumbled something about a refugee claim” to which the Delegate responded “it's too late for that; you cannot make a refugee claim now”.

ISSUES

[17] The Applicants raised a number of issues which I have restated as follows:

- a. Whether the Delegate erred in issuing the removal order and in rejecting the Applicant's claim for refugee status; and
- b. Whether subsection 99(3) of the Act violates section 7 of the Charter and is therefore of no force or effect?

Whether the Delegate erred in issuing the removal order and in rejecting the Applicants' claim for refugee status?

[18] Section 99(3) of the Act provides that a person who is subject to a removal order cannot make a claim for refugee protection:

99.(3) A claim for refugee protection made by a person inside Canada must be made to an officer, may not be made by a person who is subject to a removal order, and is governed by this Part.

99.(3) Celle de la personne se trouvant au Canada se fait à l'agent et est régie par la présente partie; toutefois la personne visée par une mesure de renvoi n'est pas admise à la faire.

[19] The Respondent's position is that Ms. Mitchell made no reference to wishing to make a refugee claim until after the removal order had been issued by the Delegate. When she did, it was too late because section 99(3) of the Act prohibits the making of a refugee claim after the removal order has issued. The Respondent further submits that Ms. Mitchell gave no indication in her meeting and interview with the Delegate that she had any fear of returning to Grenada and thus there was no need to further explore whether a refugee claim might be made.

[20] Ms. Mitchell's evidence is that she told both the Officer and the Delegate that she wished to have counsel present. She claims that she was denied that right by the Delegate, in particular. The Delegate states that Ms. Mitchell was informed of her right to counsel and was told that it was not necessary and that Ms. Mitchell agreed to continue without counsel. Ms. Mitchell's evidence is that she told the Delegate that she wished to seek refugee protection prior to the removal order issuing but was denied that right. She was told that it was too late to advance that claim.

[21] The burden is on Ms. Mitchell to establish on the balance of probabilities her contention that the Delegate issued the order despite the fact that a claim for refugee protection had been made. In essence, she claims that by failing to receive a claim for refugee protection, an immigration officer acted contrary to the Act and to Canada's international obligations. She questions both the Delegate's integrity in claiming that she refused the claim for protection and the Officer's integrity in claiming that he denied her the right to counsel. In order to prove such allegations, the facts upon which they are based must be established by Ms. Mitchell. In my view she has failed to discharge her burden of proof.

[22] The only evidence supporting Ms. Mitchell's allegations is her own evidence. She claimed for the first time in her cross-examination that the Officer failed to inform her of her right to counsel. She made no such allegation in her affidavit filed in support of this application. Given the significance of such an allegation and the failure to assert it earlier when she was represented by counsel, suggests that it is a recent fabrication by her to lend support to her claim that her rights were infringed.

[23] Further, while the Officer failed to have the Section 44 Report signed by Ms. Mitchell, it was prepared within hours of their meeting and in advance of any claim by her that he had acted improperly. The Section 44 Report he prepared supports his evidence that he advised Ms. Mitchell of her Vienna Convention rights and her right to counsel. Ms. Mitchell's evidence on cross-examination supported his evidence that she was advised of her Vienna Convention rights. It is surprising that Ms. Mitchell would testify that she did not think she needed a lawyer when detained by the immigration authorities when her consultant had just recently advised her to do just that if detained.

[24] No evidence has been offered nor any submission made however speculative, as to why the Officer might provide false evidence or fabricate the facts.

[25] Similarly, the Delegate prepared notes contemporaneous with her interview of Ms. Mitchell. These notes support her assertion that Ms. Mitchell said that she had no fear in returning to Grenada and, inferentially, that no refugee claim was made until after the removal order issued. As with the Officer's evidence, no evidence has been offered nor any submission made however speculative, as to why the Delegate might provide false evidence or fabricate the facts.

[26] At the hearing, both counsel engaged in an examination of the evidence of the witnesses from their affidavits and the transcripts of the cross-examinations, pointing out alleged inconsistencies, with a view to supporting their own client's position. While there were some minor

variances in evidence, I am of the view that they offer little to support the position of one party or the other. In my opinion, the fact that the Section 44 Report and the Minister's Delegate Report, which corroborate the testimony of the Officer and the Delegate, were contemporaneous is a sufficient reason to prefer their testimony to that of the Ms. Mitchell.

[27] Accordingly, Ms. Mitchell has failed to establish, on the balance of probabilities that she made any request for counsel or that she made a refugee claim prior to the removal order issuing. In fact, in saying that she had no fear in returning to Grenada, Ms. Mitchell made it clear that she had no basis for a refugee claim.

Does subsection 99(3) of the Act violate section 7 of the Charter?

[28] The Applicants submit that the Charter has two applications to the facts at hand. Firstly, it is submitted that section 99(3) of the Act violates the Charter in denying a person the right to make a refugee claim after a removal order has been filed. Secondly, it is submitted that the application of section 7 requires that an officer expressly inform a person of the right to make a refugee claim, the consequences of making or not making the claim, and obtain the waiver in writing.

[29] The Applicants rely on the decision of the Supreme Court of Canada in *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, as authority for the proposition that a request to make a refugee claim triggers the Charter. That decision dealt with persons who had made a claim for refugee protection under the former Act. The Supreme Court held that the procedure under the former Act for determining refugee claims was inconsistent with the

requirements of fundamental justice described in section 7 of the Charter in that they failed to provide the applicant an adequate opportunity to state his case and to know the Minister's case.

[30] In *Singh* the applicants made an application for refugee status and it was processed in accordance with the procedures that the former Act provided. Here, the Applicants never made a claim for refugee protection under the Act because section 99(3) intervened when that claim was advanced. Thus, it was never processed.

[31] More importantly, as counsel for the Respondent submitted, the Charter is not engaged at the eligibility determination stage: *Soe v. Canada (Minister of Citizenship and Immigration) et al.*, 2007 FC 671, and the authorities cited therein. There is no denial of the right to life, liberty and security of the person or the deprivation of those rights in denying a person the right to make a refugee protection application. That person's Charter rights under section 7 are brought into play when there is to be a removal to the country of origin. At that point there will be a Pre-Removal Risk Assessment made to determine if the removal to the home country poses any risk to the person.

[32] Accordingly, I find that section 99(3) does not offend section 7 of the Charter.

[33] The Applicants further submit that since a refugee protection claim triggers section 7 of the Charter a claimant must be accorded fundamental justice which includes the notion of procedural fairness. It is submitted that procedural fairness dictates that an officer considering issuing a

removal order must expressly inform a person of the right to make a refugee claim, what such a claim means and if the right to such a claim is waived, obtain that waiver in writing.

[34] The waiver of right to counsel occurred during the removal order process. This Court has held that section 7 rights are not engaged during this process: *Mursal v. Canada (Minister of Immigration and Citizenship)*, 2003 FC 995. Accordingly, I find that there has been no Charter violation in the facts of this case.

CONCLUSION

[35] This application is dismissed.

CERTIFIED QUESTIONS

[36] The Applicants ask that the following questions be certified:

1. Is the prohibition to make a claim for Convention refugee status under s. 99(3) of the *Immigration and Refugee Protection Act*, S.C. 2001, unconstitutional owing to a violation of s. 7 of the Charter?
2. Does an immigration officer conducting an inadmissibility interview (or a Minister's delegate review officer) have the authority to make a section 52 of the Charter determination applicable only to the party (parties) before it, the effect of which, as recognized in, *inter alia*, *Kaur* and *Grewal*, would be to exempt the party (parties) from the application of s. 99(3) of the *Immigration and Refugee Protection Act*, S.C. 2001, on constitutional grounds?

3. Does an immigration officer under s. 99(3) of the *Immigration and Refugee Protection Act*, S.C. 2001 have a duty pursuant to s. 7 of the Charter to obtain an informed, explicit and expressed waiver namely a written waiver for the right to make a refugee claim?

[37] The Respondent was permitted an opportunity to respond in writing to the Applicants' proposed certified questions. The response filed was detailed and lengthy. Much of the response constituted a repetition of the oral argument made at the hearing on the merits. I focused my consideration of the response to that part dealing with the issue of whether the questions proposed transcend the interests of the parties to the litigation, contemplate issues of broad significance or general application and, would be determinative of the appeal.

[38] Proposed questions #1 and #3 essentially raise the issue of the application of section 7 of the Charter to removal orders under the Act. It has previously been established that the making of a removal order does not engage section 7 of the Charter: *Rodrigues v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1055; *Berrahma v. Canada (Minister of Citizenship and Immigration)*, [1991] F.C.J. 180, 132 N.R. 202, and thus these proposed questions do not address an issue of broad significance or general application that would be determinative of the appeal.

[39] The Federal Court of Appeal in *Gwala v. Canada (Minister of Citizenship and Immigration)*, [1999] 3 F.C. 404, has determined that an officer has no jurisdiction to make a determination of law as would be required if the officer were to exempt a party from the application

of subsection 99(3) of the *Immigration and Refugee Protection Act* pursuant to section 52 of the Charter. Accordingly, proposed question #2 does not meet the criteria to be certified question.

[40] In any event, on the facts of this case none of these questions would be determinative of an appeal as Ms. Mitchell had already stated that she had no fear in returning to Grenada prior to uttering the word “refugee”. As her counsel correctly accepted, section 99(3) of the Act is intended to prevent abuses. The situation of Ms. Mitchell would be such an abuse, having already indicated that she had no basis for any legitimate refugee claim.

[41] Accordingly, no question is certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed and no question is certified.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5319-07

STYLE OF CAUSE: MARLIN MITCHELL and MAKIDA MITCHELL
(by her litigation guardian Marlin Mitchell) v.
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PLACE OF HEARING: Toronto, Ontario

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**REASONS FOR JUDGMENT
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