Date: 20080923

Docket: IMM-5012-07

Citation: 2008 FC 1069

Ottawa, Ontario, September 23, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

SALAH HASAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Applicant, Mr. Salah Hasan, came to Canada in 2001 from Iraq as a government sponsored resettled refugee. By 2004, Mr. Hasan had been convicted of eight criminal offences including assault, uttering threats and sexual interference with a minor. Mr. Hasan was subsequently reported as an inadmissible permanent resident because of serious criminality pursuant to s. 44 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). In February 2005, Canada Border Services Agency (CBSA) officials informed Mr. Hasan of their intention to seek the

opinion, pursuant to s. 115(2)(a) of IRPA, from the Minister of Citizenship and Immigration (the Minister) that he was a danger to the public and, thus, could be returned to Iraq.

[2] In a decision dated November 9, 2007, the Minister's delegate determined that the Applicant was a danger to the public in Canada and, as such, could be refouled to Iraq. Specifically, the delegate found that:

- the Applicant constitutes a danger to the public (the danger assessment);
- he would not face a risk warranting protection under s. 97 of IRPA (the risk assessment);
- any risk that he would face did not outweigh the danger that he poses to Canadian society; and
- there are insufficient humanitarian and compassionate considerations to overcome the danger that the Applicant poses to the Canadian public.

[3] The Applicant seeks judicial review of the decision.

II. Issues

[4] During oral submissions, the Applicant focussed his arguments to three areas:

1. With respect to the danger assessment, did the Minister's delegate err by imposing a burden on the Applicant to show that he was not a danger to the Canadian public?

2. With respect to the risk assessment:

    a. Given that the Applicant was a Convention refugee, did the delegate err by imposing a burden on the Applicant to show that he would be at risk in Iraq?

    b. If the correct burden was used, did the Minister breach the duty of fairness by failing to give notice of the burden of proof to be met by the Applicant?

3. Did the Minister's delegate improperly balance the risk of removal with the public danger posed by the Applicant to Canadian society by failing to recognize:

    a. the stay on removals to Iraq made by the Minister pursuant to s. 230 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the IRP Regulations); and

    b. the generalized risk of death in Iraq?

III. Statutory Framework

[5] Mr. Hasan was accepted by Canada as a Convention refugee. A basic concept accepted by Canada in its refugee protection legislation is that of non-refoulement. As stated in s. 115(1) of IRPA:

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	**115.** (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

[6] There are exceptions to the principle of non-refoulement. Specifically applicable to Mr. Hasan is s. 115(2) (a) of IRPA which states that s. 115(1) does not apply in the case of a person:

(a)	who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada. [Emphasis added]	*a*) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada; [Non souligné dans l'original]

IV. Analysis

A. *Standard of Review*

[7] I begin, as I must, by directing my mind to the appropriate standard of review. In light of *Dunsmuir v. New Brunswick*, 2008 SCC 9, there are now only two standards of review. That same case tells us, at paragraph 57, that courts may rely on existing jurisprudence in determining the proper standard of review. Pre-*Dunsmuir*, the case law showed that s. 115 decisions were reviewable on a standard of patently unreasonableness (*Suresh v. Canada (Minister of Citizenship and Immigration.)*, 2002 SCC 1, [2002] 1 S.C.R. 3 at paras. 29, 32, 34, 38, 39, 41, *Nagalingam v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 229 (F.C.T.D.), [2008] 1 F.C.R. 87 (*Nagalingam Trial)* at paras. 18, 28, 30, 39, *Thanabalasingham v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 172, 269 F.T.R. 273 at para. 60, *Dadar v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1381, 42 Imm. L.R. (3d) 260 at para. 13, *Fabian v. Canada (Minister of Citizenship and Immigration*), 2003 FC 1527, 244 F.T.R. 223 at paras. 19-20). However, the case law is also clear that questions of law made by the Minister are to be reviewed on a standard of correctness (see *Nagalingam Trial*, above, at para. 19).

[8] In this case, the alleged errors raised by the Applicant in respect of the danger assessment and the risk assessment are either errors of law that are reviewable on a standard of correctness or a breach of procedural fairness for which no standard of review is applicable.

[9] The alleged errors related to the balancing of interests are essentially that the delegate failed to have regard to certain relevant matters. A failure to have regard to material is a ground of review under s. 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Such an error may require intervention of the Federal Court, regardless of the standard of review.

B. *General Principles*

[10] The proper approach to be taken by a delegate is well established (see, for example, *Nagalingam v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 153, 292 D.L.R. (4th) 463 (*Nagalingam Appeal*); *Ragupathy v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 834, 275 F.T.R. 311). The principles and steps leading to the delegate's decision under s. 115(2)(a) are the following:

1. A protected person or a Convention refugee benefits from the principle of *non-refoulement* recognized by s. 115(1) of IRPA, unless the exception provided by paragraph 115(2)(a) applies;

2. For paragraph 115(2)(a) to apply, the individual must be inadmissible on grounds of serious criminality (s. 36 of IRPA);

3. If the individual is inadmissible on such grounds, the delegate must determine whether the person should not be allowed to remain in Canada on the basis that he or she is a danger to the public in Canada;

4. Once such a determination is made, the delegate must proceed to a s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the *Charter*) analysis. To this end, the delegate must assess whether the individual, if removed to his country of origin, will personally face a risk to life, security or liberty, on a balance of probabilities. This assessment must be made contemporaneously; the Convention refugee or protected person cannot rely on his or her status to trigger the application of s. 7 of the *Charter* (*Suresh*, above, at paragraph 127).

5. Continuing his analysis, the delegate must balance the danger to the public in Canada against the degree of risk, as well as against any other humanitarian and compassionate considerations (*Suresh*, above, at paragraphs 76-79; *Ragupathy*, above, at paragraph 19).

[11] A review of the decision before the Court in this application shows that the delegate followed the necessary steps in the analysis. The Applicant asserts, however, that, in carrying out her analysis, the delegate made reviewable errors in three critical areas.

C. *Danger Assessment*

[12] The first alleged error occurred during the delegate's danger assessment where, the Applicant asserts, the delegate incorrectly placed the burden on the Applicant. In other words, the

Applicant argues that the delegate forced the Applicant to prove that he would not be a danger to the public in Canada. The Applicant draws this conclusion on the basis of the delegate's use of the phrase "I am not satisfied" in the following references from the decision:

- I am not satisfied when Counsel suggests that this [no re-offence in 18 months and programs during his incarceration] proves that he is not a future danger to the public.

- Although Counsel provided information on the programs Mr. Hasan completed while he was incarcerated, in my view, many opinions raised in these reports do not satisfy me that he is completely rehabilitated or is unlikely to reoffend.

- Although as counsel states, Mr. Hasan has not have [sic] reoffended since the time he was released from prison based on the circumstances surrounding the conviction, combined with the information from reports while Mr. Hasan was incarcerated, I am not satisfied that he would not reoffend and possibly cause harm to other innocent victims.

[13] It is acknowledged by both the Applicant and the Respondent that the Minister bears the burden of showing that the Applicant is a danger to the public. To reverse that onus and require an applicant to satisfy the delegate that he or she is not a continuing danger to the public has been held to be an error. Such was the situation in *Kim v. Canada* (1997), 127 F.T.R. 181, where the delegate's final recommendation read: "the information provided does not satisfy me that this type of violent behaviour will not occur again."

[14] That is not the situation before me. It is evident from a reading of this section of the decision that the delegate was aware of the correct burden. The delegate begins the section by setting out what the correct burden is on the Minister and, after her careful analysis of the evidence, concludes:

> …the sexual interference conviction, along with his other criminal conduct, is such that in my opinion, Mr. Hasan constitutes a danger to the public in Canada and more particularly a danger to vulnerable Canadian women in society.

[15] Does the use of the phrases incorporating the words "I am not satisfied" in the body of this portion of the decision mean that the delegate, in this case, incorrectly imposed a burden on the Applicant? I do not think that this is the case when the danger assessment section of the reasons is read as a whole.

[16] This section of the reasons demonstrates that the delegate examined the evidence of the criminal convictions and the alleged rehabilitation. Her task was to determine, on a balance of probabilities, whether the Applicant was a danger; the delegate was required to weigh all of the evidence before her. Much of the evidence was provided by CBSA – the record of his criminal convictions and his prison reports. This is not a situation where the delegate relied solely on the fact that the Applicant had a criminal record. The decision demonstrates that the delegate carefully considered the circumstances of the convictions and the behaviour of the Applicant during and subsequent to his incarceration.

[17] The only evidence offered by the Applicant was the fact that he had taken behavioural courses during his imprisonment and that he had not reoffended in 18 months. Each of the allegedly improper references cited above relates to the Applicant's assertions that he was rehabilitated

through attendance at courses during his imprisonment and would not reoffend. The delegate carefully reviewed the programs that were referred to and noted that the Applicant had received various negative evaluations from the course providers. The delegate also observed that the Applicant was involved in altercations during his incarceration and described himself as a “victim”. Use of the words “I am not satisfied” reflects, in my reading of the decision, a weighing of the evidence by the delegate and not an application of an incorrect burden on the Applicant. On the basis of the evidence, it was entirely reasonable for the delegate to observe that this evidence did not outweigh the substantial evidence before her on the danger that the Applicant posed.

[18] I am not persuaded that the delegate erred as submitted by the Applicant.

D. *Risk Assessment*

[19] The Applicant’s first submission on the risk assessment is that, once a person has been found to be a Convention refugee, the person has *prima facie* demonstrated that he is at risk in his country of origin. Thus, the burden is on the Minister to show that the person would not be at risk upon his removal. This approach, the Applicant submits, would be consistent with Canada’s international obligations and with the notion of cessation found in the Convention and embodied in s. 108 of IRPA. Under this provision, the Minister may apply to the Refugee Protection Division of the Immigration and Refugee Board (RPD) to have the RPD determine that refugee protection has ceased for the reason that, *inter alia*, the reasons for which the person sought refugee protection have ceased to exist (s. 108(1)(e)). The Applicant argues that, since the Minister bears the burden

under s. 108, the Minister should also bear the burden under s. 115, which provision has the same effect of stripping a person of refugee status.

[20] I find no merit in this argument. The key flaw in the Applicant's position is that s. 115(2) does not remove the person's status as a protected person or Convention refugee. The non-refoulement principle is clearly stated in s. 115(1). The delegate's decision was made pursuant to s.115(2) of IPRA and did not remove or alter the Applicant's status as a Convention refugee (*Ragupathy*, above, at para. 2, *Sittampalam v. Canada (Minister of Citizenship and Immigration*, 2007 FC 687, 62 Imm. L.R. (3d) 271 at para. 52).

[21] There is no requirement in s. 115(2) that the Minister must assess the risk to the person who has been found to be a danger. That obligation arises from the operation of s. 7 of the *Charter*, as decided by the Supreme Court of Canada in *Suresh*, above. Thus, there is no parallel between the cessation provisions of s. 108, which explicitly require the Minister to demonstrate that the reasons for which the person sought refugee protection have ceased to exist, and s. 115, where the only obligation arises as a result of the *Charter*.

[22] The jurisprudence is clear that, once the Applicant is found to be a danger to the public, he must establish that he would be at risk (see, for example, *Camara v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 168 at paras. 58-60; *Al-Kafage v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 815, 63 Imm. L.R. (3d) 234 at para. 15, *Nagalingam Trial*, above, at para. 25). Most recently in *Nagalingam Appeal*, above, the Court confirmed, at

paragraph 44, that “the Convention refugee or protected person cannot rely on his or her status to trigger the application of section 7 of the Charter”.

[23] The delegate did not erroneously place the onus on the Applicant to prove that he faced the risk of torture or risk to life if returned to Iraq. I also reject the Applicant’s allegation that he is being asked to re-prove that he remains a Convention refugee, that he has no internal flight alternative, or that he still faces the same conditions as when he was initially granted refugee status. It is obvious that the delegate did not require the Applicant to prove these things. The delegate properly engaged in an assessment of the current risks facing the Applicant should he be removed to Iraq.

[24] The Applicant’s second problem with the risk assessment is that, if he does bear the burden of demonstrating that he would be at risk if returned to Iraq, he should have been provided with notice that he could not rely on his refugee status or that he bore the onus of proving that he would be at risk in Iraq.

[25] This argument also fails. In a letter dated December 6, 2004, the CBSA informed the Applicant that they were seeking a s.115 (2)(a) opinion from the Minister. This letter notified the Applicant that the Minister would consider whether it can be reasonably concluded that the Applicant constitutes a danger to the public in Canada and the possibility of risk upon return to Iraq. The Applicant was told that he could make written representations or argument deemed necessary and relevant, including those related to whether his life or freedoms were threatened by removal from Canada. In my opinion, this is adequate notice to the Applicant.

[26] In addition, I observe that the Applicant appears to have been well aware of the onus on him. Submissions made in response to the CBSA notice on behalf of the Applicant contain significant representations that go beyond merely relying on his refugee status.

[27] I conclude that the Applicant not only received adequate notice, but that he understood that notice to require him to demonstrate that his life would be at risk if he were returned to Iraq. There is no reviewable error.

E. *Balancing*

[28] As a final step in a s. 115(2)(a) analysis, the delegate must balance the danger to the public in Canada against the degree of risk, as well as against any other humanitarian and compassionate considerations (*Suresh*, above, at paragraphs 76-79; *Ragupathy*, above, at paragraph 19; *Nagalingam Appeal*, above, at paragraph 44). The Applicant apparently does not dispute the balancing carried out vis-à-vis any humanitarian and compassionate considerations. However, he raises two arguments with respect to the balancing of risk factors.

[29] The first concern is that the delegate failed to have regard to the fact that the Minister has imposed a stay on removals to Iraq pursuant to s. 230 of the IRP Regulations. That provision states that:

230. (1) The Minister may impose a stay on removal orders with respect to a country or a place if the circumstances in that country or place pose a generalized risk to the entire	**230.** (1) Le ministre peut imposer un sursis aux mesures de renvoi vers un pays ou un lieu donné si la situation dans ce pays ou ce lieu expose l'ensemble de la population

civilian population as a result of (*a*) an armed conflict within the country or place; (*b*) an environmental disaster resulting in a substantial temporary disruption of living conditions; or (*c*) any situation that is temporary and generalized.	civile à un risque généralisé qui découle : *a*) soit de l'existence d'un conflit armé dans le pays ou le lieu; *b*) soit d'un désastre environnemental qui entraîne la perturbation importante et momentanée des conditions de vie; *c*) soit d'une circonstance temporaire et généralisée.

[30] There are two problems with the Applicant's submission on this point. The first difficulty with the s. 230 argument is that it was not raised by the Applicant in his submissions to the CBSA. That alone is sufficient to deal with the argument.

[31] However, even more importantly, a s. 230(1) moratorium does not apply to the Applicant. Section 230(3) explicitly states that the stay under s. 230(1) does not apply to a person who is inadmissible on grounds of serious criminality (IRPA, s. 36(1)) or criminality (IRPA, s. 36(2)). The Applicant has been found to be inadmissible on grounds of serious criminality. He cannot rely on the stay provisions of s. 230

.

[32] For these reasons, the delegate did not err by failing to refer to the stay on removals to Iraq.

[33] The Applicant also argues that the fact that he faces a risk of death in Iraq should have received more weight from the delegate. The Applicant invokes the case of *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283 as support for his position that the *Charter* requires that a person

be removed to a serious risk of death only in exceptional circumstances. The problem with this argument is that it is unsupported by the evidence or submissions before the delegate. There was no evidence before the delegate and there is none before me that the Applicant faces a serious risk of death. I am satisfied that the delegate applied the correct standard and did not err in balancing the risk of return to Iraq against the danger to the public in Canada.

IV. Conclusion

[34] For these reasons, the application for judicial review will be dismissed.

[35] The Applicant requests that I certify the following three questions:

1. Is everyone from a country designated under IRP Regulation 230 to be considered at risk for the purpose of balancing risk to the person against risk to Canada under s. 115(2) of IRPA?

2. For the purposes of the balancing exercise in s. 115(2), where the individual concerned is a Convention refugee, does the onus rest of the individual to show that the risk which led to the refugee determination continues or does the finding that a person is a Convention refugee create a rebuttable presumption that the person is at risk on return?

3. If the answer to the previous question is that the onus rests on the individual and that there is no rebuttable presumption, does the duty of fairness require the individual who is a Convention refugee to be specifically notified of this onus?

[36] In my view, these questions do not meet the test for certification.

[37] With respect to the first question, as noted above, s. 230 of the IRP Regulations has no application to the Applicant who is inadmissible to Canada for serious criminality. Further, the existence of a moratorium was not put before the delegate for consideration. Thus, this question is not determinative of this Application.

[38] I observe that the wording of the second proposed question is an incorrect characterization of the burden on the Applicant. The Applicant is not required to "to show that the risk which led to the refugee determination continues". Rather he is required to demonstrate that he would be at risk if returned to Iraq. It could be that the risk that led to a refugee determination no longer exists but that a completely new risk is apparent.

[39] More significantly, the second question is one that has been addressed on numerous occasions by this Court and the Court of Appeal. The onus rests with the person who is the subject of the possible danger opinion to present evidence of risk. There is no need to certify a question that is settled by the jurisprudence.

[40] The third question does not arise on these facts. As evidenced by his submissions on the danger opinion, the Applicant was well aware that he was responsible for providing submissions and evidence related to the risk that he faced in Iraq. In any event, the notice provided in this case was adequate notice that the Applicant.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. the Application for Judicial Review is dismissed; and

2. no question of general importance is certified.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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