Date: 20091023

Docket: IMM-45-09

Citation: 2009 FC 1073

BETWEEN:

ASON HASSAN MAZINANI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER

GIBSON D.J.

Introduction

[1] These reasons arise out of the hearing at Toronto on the 25th of September, 2009 of an application for judicial review of a decision of a Delegate of the Respondent, dated the 16th of September, 2008, rendering an opinion that the Applicant constitutes a danger to the public in Canada, on grounds of serious criminality. In the result, the Applicant, recognized as a Convention refugee in Canada, is not exempt from removal to his country of nationality, Iran.

[2] The relevant provisions of the *Immigration and Refugee Protection Act*[1] read as follows:

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[1] S.C. 2001, c. 27.

<u>115.</u> (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.	**<u>115.</u>** (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.
(2) Subsection (1) does not apply in the case of a person	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
(*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;	*a*) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
…	…

Background

[3] The Applicant was born and brought up in Iran in a family that supported the Shah. When the Shah was overthrown, the Applicant's family, and the Applicant himself as a youth, continued to support the former regime. Fearing persecution, and with the support of his family, the Applicant fled Iran and arrived in Canada in August 1990. At the time of his arrival, he was just under 16 years of age. He had the support of an older brother here in Canada.

[4] The Applicant claimed Convention refugee status. His claim was granted in mid-October 1995. While the Applicant's claim was pending, the Applicant's older brother died. The Applicant turned to the use of drugs and criminality.

[5] The Applicant applied for permanent resident status in Canada but his application was denied. He was found to be inadmissible by reason of serious criminality. The Applicant remains without status in Canada to this day.

[6] The Applicant was ordered deported on the 24th of August, 2000. He appealed that order to the Immigration Appeal Division of the Immigration and Refugee Board but his appeal was dismissed on the 26th of June, 2002.

[7] A danger to the public in Canada opinion ("danger opinion") was issued against the Applicant in January 2002. Judicial Review of that opinion was sought and the judicial review application was allowed. The danger opinion was not, at that time, renewed.

[8] On the 23rd of February, 2007, based upon further charges against the Applicant for offences allegedly committed in 2003 that resulted in convictions in late June 2007, the Applicant was advised that a danger opinion would again be sought against him. Extensive submissions were filed on behalf of the Applicant. In the result, without providing the Applicant an interview at which he would have been able to support and perhaps amplify his submissions, the danger opinion here

under review issued. The Applicant was served with the danger opinion on the 22nd of December, 2008.

[9] The Applicant alleges that, well before the time the current danger opinion issued and continuing until that time, he was well on his way to rehabilitation with strong community support from his Canadian citizen fiancée and his father who now divides his time between Canada and Iran. He alleges that he is deeply committed to a methadone treatment program to deal with his drug dependency, and filed third-party evidence to support that allegation, and he is employed both in his father's business and in volunteer work.

[10] The Applicant's record of convictions is as follows:

a. December 29, 1993; convicted of possession of a narcotic, subsection 3(1) of the *Narcotics Control Act*; punishment, a fine of $50;

b. September 28, 1994; convicted of carrying a concealed weapon, section 89 of the *Criminal Code*; punishment, imprisonment for 14 days, probation for two years and prohibited from possessing firearms, ammunition or explosive substances for five years;

c. February 15, 1999; convicted of possession of a narcotic for the purpose of trafficking – heroin and cocaine (x 2) and trafficking in a narcotic – heroin and cocaine (x 2), subsections 4(2) and 4(1) of the *Narcotics Control Act*; punishment, imprisonment for four years on each charge, to be served concurrently; the Applicant was paroled on September 10, 2000, however on March 11, 2002, he was recommitted as a parole violator; his statutory release date was November 12, 2002, however, on April 24, 2003, he was recommitted as a statutory release violator;

d. March 10, 1999; convicted of mischief under $5,000, subsection 430(4) of the *Criminal Code*; punishment, a fine of $100 and probation for 30 days;

e. November 12, 2002; convicted of impaired care and control of a motor vehicle, paragraph 255(1)(b) of the *Criminal Code*; punishment, a fine of $700 and driving suspension for one year;

f. June 29, 2007; convicted of possession of cocaine for the purpose of trafficking, subsection 5(2) of the *Controlled Drugs and Substances Act*; punishment, imprisonment for five months in view of 287 days pre-trial custody; and convicted of possession of a firearm knowing possession was unauthorized, subsection 92(3) of the *Criminal Code*; punishment, sentenced to imprisonment for five months to be served concurrently.

The Decision Under Review

[11] The Delegate of the Respondent (the "Delegate") who issued the danger opinion here under review supported his or her decision with extensive and detailed reasons. The first paragraph of those reasons reads as follows:

> These are the reasons for my determination pursuant to paragraph 115(2)(a) of the *Immigration and Refugee Protection Act (IRPA)* concerning Mr. Mazinani and whether he constitutes a danger to the public in Canada. A determination that Mr. Mazinani does not pose a danger to the public will permit him to remain in Canada. A determination that Mr. Mazinani constitutes a danger to the public permits him to be refouled to Iran if to do so is in accordance with section 7 of the *Canadian Charter of Rights and Freedoms (Charter)*. As outlined in the Supreme Court decision in *Suresh*, to comply with section 7 of the *Charter* requires a balancing of the risk Mr. Mazinani faces should he be refouled to Iran and the danger to the public should he remain in Canada. Humanitarian and compassionate considerations also factor into the balancing exercise. If the risk to [the] Canadian public outweighs the risk of return and any humanitarian and compassionate considerations, Mr. Mazinani may be returned to Iran pursuant to paragraph 115(2)(a) of *IRPA*. I have been designated by the Minister of Citizenship and Immigration Canada (CIC) pursuant to sub-section 6(1) of *IRPA* as having the authority to make such a determination.

The Delegate then goes on to consider the issue before him or her under the following headings: Part I – APPLICABLE PROVISIONS OF *IRPA*; Part II – FACTS OF THE CASE; Part III – DANGER ASSESSMENT; Part IV – RISK ASSESSMENT; Part V – HUMANITARIAN AND

COMPASSIONATE CONSIDERATIONS; Part VI – DECISION and Part VII – MATERIAL CONSIDERED.

[12] The Delegate concluded his or her factual summary, consideration and analysis in respect of each of Parts III, IV, V and VI in the following terms:

> Part III
>
> …
>
> I note that Mr. Mazinani committed his most recent offences in 2003, for which he was convicted in 2007. Mr. Mazinani's counsel submits that the sentences are relatively minor, in light of his prior criminal record, indicating that the sentencing judge considered the offences to be of a less serious nature. While I agree with counsel that the periods of incarceration were of short duration, nevertheless the Court did take into consideration a considerable period of pre-trial custody when imposing sentences.
>
> As a result, I am not satisfied that Mr. Mazinani has demonstrated that he has taken personal responsibility for the underlying factors contributing to his criminal conduct. As a result, I am likewise not satisfied, based on my review of the evidence on record, that Mr. Mazinani is sufficiently rehabilitated so that he is unlikely to reoffend following his release, taking into account the fact that he remains under the influence of his substance treatment and his release under conditions. In other words, I find it is more likely than not that Mr. Mazinani continues to be at a risk to re-offend.
>
> In light of all the above-noted considerations it is my opinion that Mr. Mazinani is a possible re-offender whose continued presence in Canada poses an unacceptable risk to the Canadian public and I, therefore, find that he is a present and future danger to the community.
>
> Part IV
>
> …
>
> I am not satisfied that information on record shows that Mr. Mazinani is a political activist or a member of any organization involved in dissident activities against Iran since he left in 1990. I am not satisfied that on balance that his life would be at risk, that he would be subject to torture or cruel and unusual treatment or punishment as an anti-government political activist facing trial and who may have absconded while on bond at the age of 15; or as a criminal deportee and a refugee claimant.

I have no doubt that Mr. Mazinani will be questioned by the authorities upon his return to Iran, however, I am not satisfied that he is of a particular interest to the Iranian authorities because of his criminal record. Furthermore, I am not satisfied that he is of any particular interest to the Iranian authorities for dissident activities he may have been involved with when he was at the very young age of 15.

Information on record indicates that Mr. Mazinani is a Muslim who has been married to a Christian woman – they have separated, and who asserts that he does not agree with all of Islam's traditions and obligations. I am not satisfied that he has converted to any other religion, and that, on balance, he will be perceived as an apostate for having had a Christian wife in the past.

Information on record indicates that Iran has its problems dealing drugs in the country. Information also indicates that drug addiction rehabilitation programs are available to those suffering addiction. I am satisfied that, on balance, Mr. Mazinani would be able to continue his rehabilitation process. I am not satisfied that, on balance he would be at risk upon his return to Iran because of his drug addition.

<u>Part V</u>

…

In conclusion, there are some favourable humanitarian and compassionate factors in this case, most notably the fact that Mr. Mazinani suffers from drug addiction, has taken steps to address this problem and benefits by the presence and support of Ms. Nigro, with whom he is currently in a relationship; however, based on the evidence before me, I am not satisfied that there are sufficient humanitarian and compassionate factors to overcome the danger Mr. Mazinani poses to the Canadian public. I recognize that returning to a country that Mr. Mazinani left as a minor will result in a certain degree of hardship for him as he must adjust to a new culture and language; that hardship will be somewhat attenuated by the presence of his father whose business requires him to spend time in Iran as well as in Canada. As a drug addict, Mr. Mazinani may avail himself of the drug rehabilitation programs that are available in Iran.

<u>Part VI</u>

…

The pertinent objectives outlined in *IRPA* are as follows:

> 3.(1) The objectives of this Act with respect to Immigration are
>
> …

> *(h)* to protect the health and safety of Canadians and to maintain the security of Canadian society;
>
> *(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
>
> …
>
> 3.(3) This Act is to be construed and applied in a manner that
>
> *(a)* furthers the domestic and international interests of Canada;
>
> …
>
> (*f*) complies with international human rights instruments to which Canada is a signatory.

> After fully considering all facets of this case, including the humanitarian aspects, and an assessment of any possible risk that Mr. Mazinani might face if returned to Iran and the need to protect Canadian society, I find the latter outweighs the former. In other words, upon consideration of all factors noted above, I am of the opinion that the need to protect members of the Canadian public, weighs in favour of Mr. Mazinani's removal from Canada, particularly in light of my finding that he would not personally face any of the risks under section 97 of *IRPA* if he is returned to Iran. I, therefore, find that Mr. Mazinani may be deported despite subsection 115(1) of *IRPA*, since removal to Iran would not violate his rights under section 7 of the *Charter of Rights and Freedoms*.

The Issues

[13] In the Memorandum of Fact and Law filed on behalf of the Applicant, Applicant's counsel identified standard of review and three other issues on this application for judicial review. He described the three other issues in the following terms:

> i. first, whether the Minister's Delegate erred in the determination that the Applicant was a danger to the public in Canada;
>
> ii. second, whether the Minister's Delegate erred in assessing the risk to the Applicant upon his return to Iran; and

iii. third, whether the Minister's Delegate erred in assessing the hardship to the Applicant or others if he is returned to Iran.

Within each of the three substantive issue areas, counsel for the Applicant urged a plethora of errors that, taken together, he urged, constituted reviewable error against the appropriate standard of review.

[14] Counsel for the Respondent urged that a determination by a Minister's Delegate under subsection 115(2) of *IRPA* is entitled to a high degree of deference since a danger opinion is a fact-driven inquiry involving the weighing of various factors and possessing a "negligible legal dimension". Against that test, counsel for the Respondent urged that the Delegate made no reviewable error.

Analysis

1) Standard of Review

[15] In *Suresh v. Canada (Minister of Citizenship and Immigration)*[2], a danger opinion case, the Supreme Court wrote at paragraph 29 of its reasons:

> The first question is what standard should be adopted with respect to the Minister's decision that a refugee constitutes a danger to the security of Canada. We agree with Robertson J.A. that the reviewing court should adopt a deferential approach to this question and should set aside the Minister's discretionary decision if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors. The court should not reweigh the factors or interfere merely because it would have come to a different conclusion. [emphasis added]

[2] [2002] 1 S.C.R. 3.

[16] In *Nagalingan v. Canada (Minister of Citizenship and Immigration)*[3], also a danger opinion case decided by the Federal Court of Appeal in the post *Dunsmuir*[4] era, the foregoing was affirmed by the Federal Court of Appeal and the Court continued at paragraph [34] of its reasons in the following terms:

> In the case at bar, I note that there is no privative clause in the Act – rather the right to judicial review before the Federal Court is expressly provided so long as leave is granted… . Additionally, the questions of law in this appeal demand the interpretation and application of general common-law and international-law principles for which the Delegate does not have more expertise than the Court. As a result, I conclude that Justice Kelen applied the proper standard of review to the questions of law raised in this application for judicial review, i.e. correctness.

[17] I adopt the guidance provided in *Suresh* and *Nagalingan* albeit that the standard of review of patent unreasonableness has now been melded into the standard of review of reasonableness.

[18] I am further satisfied that any breach of natural justice or procedural fairness found on an application for judicial review such as this should be reviewed on a standard of correctness.

2) Weighing of the evidence on danger to the public in Canada, on the risk to the Applicant upon his return to Iran, if such should be the case, and on assessing the hardship to the Applicant and others if the Applicant is required to return to Iran and balancing of the Delegate's conclusions regarding danger to the public in Canada on the one hand and risk to the Applicant on return to Iran and hardship to the Applicant and others if he is returned

[19] Counsel for the Applicant took issue, at substantial length before the Court, with regard to the Delegate's weighing of the evidence before him and balancing of his or her conclusions

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[3] [2009] 2 F.C.R. 52 (F.C.A.).
[4] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

regarding danger to the public in Canada on the one hand and risk to the Applicant if he is returned to Iran and hardship to the Applicant and others if he is returned to Iran, on the other.

[20] To begin with, I note that the Court finds no indication on the face of the Delegate's lengthy consideration of the evidence and analysis based on that evidence that he or she took issue with the Applicant's credibility. Rather, he or she engaged in a weighing of the Applicant's evidence against the other evidence before him or her, a task that is at the heart of the Delegate's responsibility and expertise.

[21] In *Dunsmuir*, *supra*, Justices Bastarache and LeBel wrote at paragraph [47] of their reasons:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[22] Despite the able and imaginative submissions made on behalf of the Applicant, I am satisfied that the Delegate's review of the evidence before him or her and analysis of that evidence against the issues before him or her were both fair and reasonable and, in the result, that his or her conclusions drawn from the evidence and his or her analysis led to a decision that "…falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[23] With great respect, counsel for the Applicant invites me to substitute my view of the totality of the evidence for that of the delegate. That is not the role of the Court in a matter such as this. Nor is it the role of the Court to parse the Delegate's summary of the evidence before him or her and his or her analysis flowing from that summary of the evidence with a "fine tooth comb". I decline counsel's invitation to do so.

[24] Subject to what follows, against a standard of reasonableness, I find the Delegate's decision to be reasonably open to him or her, based on the evidence before him or her and the applicable law.

3) Alleged errors of law and breaches of natural justice and procedural fairness

[25] Counsel for the Applicant urges that the Delegate improperly relied on withdrawn or dismissed charges laid against the Applicant and in so doing erred in law and in a reviewable manner against a standard of review of correctness.

[26] In *Sittampalam v. Canada (Minister of Citizenship and Immigration)*[5], Justice Snider wrote at paragraphs 34 to 37 of her reasons:

> I first observe that a reading of the Danger Opinion as a whole does not show that the Delegate placed an inappropriate amount of weight on the failed convictions. Rather, they are seen as part of the larger picture – a pattern of behaviour – that continued up until 2001 when the Applicant was allegedly found with instruments of forgery.
>
> However, even more responsive to this argument, are the opinions of the Federal Court and the Federal Court of Appeal in *Sittampalam I* and *Sittampalam II*. I turn to the comments of Justice Hughes in *Sittampalam I*, at para. 35 where he stated:

[5] 2007 FC 687, June 28, 2007.

> "I do not read the Member's Report at pages 53 and following under the heading "Criminality" as giving improper weight to charges laid or contemplated to be laid but which never went forward. These circumstances are mentioned in the Report but only in the context of a detailed consideration as to the circumstances themselves that were behind the charges or contemplated charges. It was these circumstances and not the charges or contemplated charges that supported the Member's finding that there were reasonable grounds for finding that section 37(1)(a) of *IRPA* applied."

> The Court of Appeal confirmed this point in *Sittampalam II*, at paragraphs 50-51 where that Court stated as follows:
>
> > "The jurisprudence of this Court indicates that evidence surrounding withdrawn or dismissed charges can be taken into consideration at an immigration hearing. However, such charges cannot be used, in and of themselves, as evidence of an individual's criminality: …
> >
> > In this regard, I agree with the Judge that the Board did not rely on the police source evidence as evidence of the appellant's wrongdoing. Rather, he considered the circumstances underlying the charges and contemplated charges – including the frequency of the appellant's interactions with the police and the fact that others involved were often gang members – to establish that there are "reasonable grounds to believe", a standard that is lower than the civil standard, that the A.K. Kannan gang engages in the type of activity set out in paragraph 37(1)(a)."
>
> <u>In my view, in the present application, we have exactly the same evidence of the police incidents being put to substantially the same use as was done by the Board in reaching the conclusion on inadmissibility.</u> If reliance in that matter by the Board, in the context of the inadmissibility determination, was acceptable to the Courts in *Sittampalam I* and *Sittampalam II*, it is certainly acceptable in the context before me.
>
> [emphasis added]

I am satisfied that precisely the same conclusion reached by Justice Snider in the last-quoted paragraph should be reached here.

4) Failure to interview the Applicant despite his request that an interview be conducted

[27] Counsel for the Applicant urges that the Delegate denied the Applicant natural justice or procedural fairness when he or she failed to interview the Applicant before arriving at the decision here under review, given that the Applicant had requested an interview.

[28] It is trite law that in the absence of an issue of credibility, a decision maker such as the Delegate is not required to provide an interview. Rather, the onus is on an applicant such as the Applicant here to provide sufficient evidence to establish that he or she should not be deported.

[29] In *Ferguson v. Canada (Minister of Citizenship and Immigration)*[6] Justice Zinn wrote:

> For the reasons that follow, I am of the opinion that no hearing was required as the decision was based solely on the weight of the evidence presented and did not rest on the Applicant's credibility.

[30] Precisely the same can be said here. In the result, against a standard of review of correctness, I am satisfied that the Delegate made no reviewable error in arriving at the decision under review without providing the Applicant with an opportunity to bolster his case at an interview.

5) Failure to consider hardship to the Applicant's fiancée, a Canadian citizen, as a humanitarian and compassionate factor in favour of the Applicant

[31] Counsel for the Applicant urges that, by failing to take into account submissions on behalf of the Applicant regarding the hardship that will befall the Applicant's fiancée if the Applicant is

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[6] 2008 FC 1067, September 23, 2008.

deported to Iran, as a humanitarian and compassionate factor weighing in favour of the Applicant, the Delegate erred in a reviewable manner. I cannot agree. The Delegate is presumed to have taken into account all of the evidence that was before him or her. The mere fact that certain of such evidence is not specifically referred to in the Delegate's reasons does not, in the absence of factors not present here, result in reviewable error.[7]

[32] Against a standard of review of correctness, I find no error of law and no denial of natural justice or procedural fairness in this regard.

Conclusion

[33] For the foregoing reasons, this application for judicial review will be dismissed.

Certification of a Question

[34] At the close of the hearing of this application for judicial review, I advised counsel that I would reserve my decision and provide them with an opportunity to make submissions in writing on certification of a question once I had finalized my reasons.

[35] Copies of these reasons will be circulated. Counsel for the Applicant will have fourteen (14) days from the day on which copies of these reasons are circulated to serve and file submissions on certification of a question. Thereafter, counsel for the Respondent will have seven (7) days to serve and file any response to the Applicant's submissions. Once again thereafter,

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[7] see: *Cepeda Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 (T.D.).

counsel for the Applicant will have seven (7) days to serve and file any reply. Only thereafter will an order giving effect to these reasons and dealing with the issue of certification of a question issue.

"Frederick E. Gibson"
Deputy Judge

Ottawa, Ontario
October 23, 2009

FEDERAL COURT

SOLICITORS OF RECORD

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