Federal Court  Cour fédérale

Date: 20101129

Docket: IMM-905-10

Citation: 2010 FC 1199

Ottawa, Ontario, November 29, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

MORENO GALLO

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for a Judicial Review of the decision of the Minister's Delegate (the Delegate), John Acheson, dated December 23, 2009 to refer the Applicant to an Admissibility Hearing before the Immigration Division of the Immigration and Refugee Board (IRB).

[2] The report relied upon by the Minister's Delegate alleged that the Applicant is a permanent resident of Canada who is inadmissible for serious criminality under paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, R.S. 2001, c. 27 (IRPA) due to his conviction in March 1974 for non-capital murder.

[3] The Applicant seeks:

- A writ of certiorari quashing the decision of the Minister's Delegate to refer the Applicant to an Admissibility Hearing;
- An Order referring this matter back for re-determination in accordance with the directions of the Court; and
- The Applicant's costs of these proceedings.

[4] For the reasons set out below, this application is dismissed.

I. Background

A. *Factual Background*

[5] The Applicant, Moreno Gallo, is a long-term permanent resident who entered Canada in 1954 at the age of eight with his mother and sister. He has been married to his wife since 1969, with whom he has three children and four grandchildren all residing in Canada. His mother and two sisters also live in Canada.

[6] In March 1974 the Applicant was convicted of murder in Montreal, Quebec. He received a life sentence and served eight years in prison before being granted day parole in 1982, full parole in 1983, and reduced parole ("liberation mitigée" subject to almost no conditions) in December 1988.

[7] In 2007 the National Parole Board (NPB) suspended the Applicant's parole after the Correctional Service of Canada (CSC) received a report following an RCMP investigation, *Projet Colisée*, that the Applicant was still actively involved in organized crime. The NPB determined that the Applicant posed an unacceptable risk to society.

[8] Upon his detention in 2007, it was determined that the Applicant was a permanent resident and that unlike the other members of his family, and for an unknown reason, he had never become a Canadian citizen.

[9] On September 23, 2008 the Delegate referred the Applicant to an Admissibility Hearing. On November 2, 2008, the Applicant made an application for leave and judicial review of that decision. While that matter proceeded through this Court, the Immigration Division issued a deportation order with respect to the Applicant following an Admissibility Hearing on February 12, 2009. The Applicant then sought judicial review of the removal order.

[10] By Court Order dated June 17, 2009, Justice Judith Snider quashed the decision of the Delegate to refer the matter to an Admissibility Hearing and sent the matter back for redetermination. Justice Snider found that there was insufficient evidence on the record to indicate that the Delegate had understood and adopted the reasons of the Analyst as her own. Consequently,

the Respondent consented to an Order quashing the deportation order that the Immigration Division had issued.

[11] On August 7, 2009 the Applicant again became the subject of a report under subsection 44(1) of the IRPA on the basis of information that he was inadmissible to Canada for serious criminality pursuant to paragraph 36(1)(a). By way of letter dated August 18, 2009 the Canadian Border Services Agency (CBSA) advised the Applicant of the inadmissibility report and invited him to make submissions. The Applicant provided written submissions, affidavits and documentary evidence regarding the Applicant's establishment in Canada and the low risk he poses to the community should he remain in Canada.

[12] On December 23, 2009, the Delegate decided to refer the Applicant to an Admissibility Hearing pursuant to subsection 44(2) of the IRPA. This was communicated to the Applicant via e-mail correspondence with a CBSA agent following correspondence from the IRB in late January 2010 requesting the contact information for the Applicant's legal counsel.

[13] The December 23, 2009 referral decision is the subject of this application for judicial review. The referral itself and the reasons for the referral were only obtained by the Applicant through this Court, pursuant to Rule 9 of the *Federal Courts Immigration and Refugee Protection Rules*. Since the latest referral decision, the Applicant was granted day parole in March 2010.

B. *Impugned Decision*

[14] The decision of the Minister's Delegate was attached to a 13 page report titled "Assessment for referral to an Admissibility Hearing for a long-term permanent resident" (the Report). In the Report the analyst concluded that notwithstanding the Applicant's residency in Canada for over 50 years, the seriousness of the crime he committed and his ability to maintain ties with people involved in criminal activities form the basis of her agreement with the recommendation of the CBSA that the Applicant be referred to an Admissibility Hearing. In its entirety, the Delegate's decision reads:

> I have reviewed the all [sic] material before me, and I agree with this recommendation. This Assessment for Referral to an Admissibility Hearing for Long-Term Permanent Resident stands as my reasons for my decision on whether «FirstName» «LastName» should be referred to an admissibility hearing.
>
> [Emphasis in original]

C. *Legislative Scheme*

[15] Paragraph 36(1)(a) of the IRPA renders permanent residents inadmissible on grounds of serious criminality if they have been convicted of an offence punishable by a maximum term of imprisonment of at least ten years or for which imprisonment of more than six months has been imposed.

[16] According to subsection 44(1) of the IRPA permanent residents who are thought to be inadmissible may be made the subject of a report which will be forwarded to the Minister. The

Minister then may refer the report to the Immigration Division for an Admissibility Hearing if he is of the opinion that the report is well-founded pursuant to subsection 44(2) of the IRPA.

[17] Although section 45 of the IRPA sets out the decisions that the Immigration Division can make following an Admissibility Hearing, if the Immigration Division is satisfied that someone in the Applicant's position is inadmissible, the only option open to it is to make a removal order against the individual.

[18] The Applicant has no appeal right from the decision of the Immigration Division pursuant to section 64 of the IRPA. This section provides that permanent residents who are inadmissible due to serious criminality may not appeal to the Immigration Appeal Division (IAD) of the IRB if a sentence of two or more years has been imposed.

[19] However, the Respondent notes that an individual such as the Applicant may apply to the Minister at any time for special relief on humanitarian and compassionate grounds pursuant to section 25 of the IRPA. The Applicant is also able to avail himself of a pre-removal risk assessment pursuant to section 112 of the IRPA.

II. Issues

[20] The Applicant raises the following issues:

(a) Did the Minister's Delegate breach the Applicant's right to procedural fairness by failing to conduct an independent assessment of the Applicant's circumstances?

(b) Did the Minister's Delegate err by adopting the assessment of the Analyst that contains numerous factual errors and conclusions that are speculative in nature?

(c) Did the Minister's Delegate err by adopting the case assessment of the Analyst that fails to take into account the totality of the evidence?

[21] The issues are best summarized as:

(a) In the case of the Applicant, was there a breach of the duty of fairness?

(b) Was the Delegate's decision to refer the Applicant to an Admissibility Hearing reasonable?

III. Standard of Review

[22] Neither party makes submissions regarding the applicable standard of review.

[23] Questions of procedural fairness are typically reviewed on a standard of correctness and as a result the decision maker is owed no deference (*Villanueva v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2010 FC 543; *Hussain v. Canada (Minister of Citizenship and Immigration))*, 2010 FC 334,).

[24] As for the Applicant's contention that the Delegate relied on a factually deficient analysis and ignored evidence, these concerns go to the merit of the decision. Justice Russel Zinn held in *Iamkhong v. Canada (Public Safety and Emergency Preparedness)*, 2008 FC 1349, 337 F.T.R. 141, that decisions made under section 44 of the IRPA being "decisions that are unlikely, on the facts, to

lend themselves to only one possible conclusion." (at para. 37) ought to be reviewed on a standard of reasonableness.

[25] As set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 and *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339, reasonableness requires consideration of the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within a range of acceptable outcomes that are defensible in respect of the facts and law.

IV. Argument and Analysis

A. *The Minister's Delegate Did Not Breach the Applicant's Right to Procedural Fairness*

[26] The Applicant submits that his right to procedural fairness has been violated because the Delegate failed to conduct an independent assessment of the Applicant's circumstances and instead relied on the Report prepared by the Analyst.

[27] The Respondent contends that there is no merit to this argument.

[28] The duty of fairness owed to an Applicant under section 44 of the IRPA has been considered several times by this Court. In *Hernandez v. Canada (Citizenship and Immigration)*, 2005 FC 429, [2006] 1 F.C.R. 3, Justice Snider assessed the extent of the procedural fairness owed by officials

under section 44 by reviewing the factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, at paras. 21-28.

[29] After considering the nature of the decision, the nature of the statutory scheme, the importance of the decision to the Applicant and the legitimate expectations of the individual challenging the decision, Justice Snider concluded that decisions made under section 44 are administrative decisions that require a "relaxed" duty of fairness. Applying this standard to subsection 44(1) and 44(2) decisions, she stated at para. 70:

> In my view, the duty of fairness implicitly adopted by CIC for purposes of the s. 44(1) report is appropriate. Although these are administrative decisions (rather than quasi-judicial) and although the person affected has some other rights to seek to remain in Canada, these are serious decisions affecting his rights. CIC, whose choice of procedures should be respected, has elected to give the affected person a right to make submissions, either orally or in writing and to obtain a copy of the report. Having a copy of the report would allow the affected person to decide whether he wishes to seek judicial review of the immigration officer's report to this Court. This, I conclude is the duty of fairness owed the Applicant and others in his position with respect to the Officer's Report.

[30] The tenor of the jurisprudence of this Court and the Federal Court of Appeal does suggest that well-established, long-term permanent residents on whom deportation would have a serious impact may, in certain circumstances (for instance where there is no right of appeal stemming from an Admissibility Hearing decision), be owed a higher-degree of procedural fairness. However, this narrowly relates to the discretion of the Minister to carefully consider any submissions made regarding the personal circumstances of the individual of a humanitarian and compassionate nature supporting the non-referral of the report (see *Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 F.C.R. 409, at para.41 and *Hernandez*, above, at para.19).

[31] Given the established content of the duty of fairness as set out above, I must agree with the Respondent that I cannot see how the Delegate, in relying on the reasons of the analyst in the Report, has breached the Applicant's right to procedural fairness.

[32] Firstly, as pointed out by the Respondent, in *Iamkhong*, above, the Court found that it is acceptable for the Minister to adopt and rely on the reasons of an officer as long as the reasons of the officer comply with the so-called Lake standard (see *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761, 292 D.L.R. (4th) 193). This standard requires that the reasons be sufficient enough to allow the individual concerned to understand why the decision was made and to allow the reviewing court to assess the validity of the decision. The Lake standard does not require that the reasons be comprehensive (*Iamkhong*, above, at paras.32 and 35). The Applicant also provided the Court with the case *Chand v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 548, 170 A.C.W.S. (3d) 144, in which the Minister's Delegate provided a handwritten note at the bottom of a report indicating that she had read the submissions and was referring the case to an Admissibility Hearing. The Court found this to be sufficient.

[33] Secondly, there is nothing to indicate that the Delegate has not done what he has claimed to have done before taking his decision, which is to have reviewed all of the material before him. In doing so, the Delegate cannot be said to have fettered his discretion. The typed form that stands as the Delegate's reasons also gives a Minister's delegate the possibility of disagreeing with the Report, an eventuality which suggests that a delegate is to make an independent determination.

[34] The Applicant relies on *Ogunfowora v. Canada (Minister of Citizenship and Immigration)*, (1997) 129 F.T.R. 14, 147 Admin. L.R. (2d) 182, for the proposition that an immigration officer cannot rely on the assessment of someone who is not the decision-maker without fettering his discretion. The Applicant argues that this can be applied analogously to the present matter in that the Delegate must conduct his own independent assessment. A decision issued 13 years ago on a completely different issue cannot trump recently decided cases exactly on point. I do not find this persuasive.

[35] The Applicant also argues that he does not know based on the Delegate's reasons, why he adopted the assessment of the analyst as his own reasons. With respect, this is a convoluted argument. The Applicant does not have a right to know why the Delegate adopted the reasoning of this specific report, but only why the Delegate decided to refer him to an Admissibility Hearing. In explicitly adopting the report as his reasons the Delegate makes it clear to the Applicant that he is being referred to an Admissibility Hearing because of the seriousness of his crime and his continued association with people involved in criminal activities, notwithstanding the factors that weighed in his favour that were canvassed in the Report.

[36] The Applicant additionally argues that the Delegate has fettered his discretion by relying on the analyst's Report which excerpts parts of the National Parole Board's September 6, 2007 decision to revoke the Applicant's parole. The Applicant suggests that relying on the decision of another decision-making body is dangerous, as the position held by that body may change. The Report cited many sources, and I do not find that there was over-reliance on the NPB decision.

Furthermore, the final recommendation of the Report is not based on any factors that may have changed since the NPB's 2007 decision.

[37] I do not find that the Applicant's right to procedural fairness was violated by the Delegate in referring the Applicant to an Admissibility Hearing pursuant to subsection 44(2) of the IRPA.

B. *The Decision to Refer the Applicant to an Admissibility Hearing was Reasonable*

[38] The Applicant argues that the report relied upon as the Delegate's assessment contains numerous factual errors, speculative conclusions and fails to take into account the positive aspects of the Applicant's circumstances.

[39] None of the errors pointed out by the Applicant have the effect of making the Delegate's decision unreasonable. A decision that clearly centered on the Applicant's conviction and life sentence for non-capital murder committed in 1974, a crime the seriousness of which the Applicant does not deny, is not rendered unjustifiable in facts and law by:

- the analyst mis-characterizing the July 17, 2009 Federal Court order that quashed the decision of the Delegate to refer the applicant to an Admissibility Hearing as quashing the Delegate's decision to issue a deportation order.
- the reference on two occasions to newspaper articles, one of which was quoted in an excerpt from the NPB's 2007 decision, when in fact, as stated by the report, the Applicant was the subject of intense media interest.

- the inclusion of comments made by members of the Montreal Police which were contained in a document from 1980. They suggest that the Applicant was involved with other murders, however, no evidence of such activity exists.
- the analyst's source-less allegation the Applicant's family's bakery is a place visited by people linked to the Italian mafia.
- the analyst's recommendation that the Applicant be referred due to the seriousness of his crime and his ability to have maintained ties with people involved in criminal activities when anyone would have the ability to maintain ties with people with criminal backgrounds.

[40] In his written submissions, the Applicant extensively details these and other perceived faults found in the Report. However, none of them are fatal to the decision. As the Applicant himself submitted, "the analyst had more than sufficient information to base his recommendation without referring to sensational media reports." I do agree with the Applicant that it is regrettable that the Delegate did not proof-read his decision and make sure to insert the Applicant's name into the typed form. However, largely, I am unable to agree with the Applicant that the report is in any way "erroneous". It is based on documentary evidence, not the analyst's imagination.

[41] Similarly, the Applicant's contention that the report did not adequately address the evidence that weighs in the Applicant's favour fails to move this Court to disrupt the Delegate's referral decision. That the Applicant would have highlighted different information in the report and ultimately come to a different conclusion is not surprising. The analyst took into account several favourable aspects of the Applicant's case – among them the Applicant's good conduct in prison,

that no charges were being laid by the RCMP as a result of *Projet Colisée*, the Applicant's family situation and his establishment in Canada.

[42] Certainly the Delegate could have chosen not to refer the Applicant to an Admissibility Hearing. But, having considered all of the relevant factors in the Applicant's case, both positive and negative, the Delegate arrived at a decision that does not fall outside of the range of possible outcomes. As such the role of this Court is not to re-weigh evidence or re-imagine the multitude of ways in which the Delegate's decision could have been alternatively formulated.

V. Conclusion

[43] No question to be certified was proposed and none arises.

[44] In consideration of the above conclusions, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "
Judge

ANNEXE “A”

Immigration and Refugee Protection Act (2001, c. 27)	*Loi sur l’immigration et la protection des réfugiés* (2001, ch. 27)
Serious criminality	Grande criminalité
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(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;	a) être déclaré coupable au Canada d’une infraction à une loi fédérale punissable d’un emprisonnement maximal d’au moins dix ans ou d’une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
[…]	[…]
Preparation of report	Rapport d’interdiction de territoire
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.	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.
Referral or removal order	Suivi
(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	(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

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 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.

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 étranger; il peut alors prendre une mesure de renvoi.

[…]

[…]

Admissibility Hearing by the Immigration Division

Enquête par la Section de l'immigration

Decision

Décision

45. The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:

45. Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes :

(a) recognize the right to enter Canada of a Canadian citizen within the meaning of the Citizenship Act, a person registered as an Indian under the Indian Act or a permanent resident;

a) reconnaître le droit d'entrer au Canada au citoyen canadien au sens de la Loi sur la citoyenneté, à la personne inscrite comme Indien au sens de la Loi sur les Indiens et au résident permanent;

(b) grant permanent resident status or temporary resident status to a foreign national if it is satisfied that the foreign national meets the requirements of this Act;

b) octroyer à l'étranger le statut de résident permanent ou temporaire sur preuve qu'il se conforme à la présente loi;

(c) authorize a permanent resident or a foreign national, with or without conditions, to enter Canada for further examination; or

c) autoriser le résident permanent ou l'étranger à entrer, avec ou sans conditions, au Canada pour contrôle complémentaire;

(d) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.

d) prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.

[…]

[…]

No appeal for inadmissibility

64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

Restriction du droit d'appel

64. (1) L'appel ne peut être interjeté par le résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.

Serious criminality

(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.

Grande criminalité

(2) L'interdiction de territoire pour grande criminalité vise l'infraction punie au Canada par un emprisonnement d'au moins deux ans.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-905-10**
STYLE OF CAUSE:	**GALLO v. MPSEP ET AL.**
PLACE OF HEARING:	**TORONTO**
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