Federal Court  Cour fédérale

Date: 20110614

Docket: IMM-4722-10

Citation: 2011 FC 693

Ottawa, Ontario, June 14, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ROBERT ROCKY FACI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the Decision of the Minister's Delegate dated 12 July 2010 (Decision) referring the Applicant to an admissibility hearing before the Immigration Division of the Immigration and Refugee Board, pursuant to subsection 44(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act). The 14 April 2010 admissibility report (Report), prepared pursuant to subsection 44(1) of the Act and adopted as reasons by the Minister's Delegate, identified the Applicant as a permanent resident of Canada who is inadmissible for serious

criminality under paragraph 36(1)(*a*) of the Act due to his convictions in July 2008 for robbery, uttering threats and failing to attend Court.

BACKGROUND

[2] The Applicant is a 25-year-old citizen of the former Yugoslavia. His father is an ethnic Albanian and his mother an ethnic Serb. He came to Canada with his family in 1990 and was granted permanent residence status under the Convention refugee category. He is single and has no children and no known relatives outside Canada. He has a good relationship with his parents, who provide him with emotional and financial support. He is currently serving a sentence of four years and seven months at the Drumheller Institution for three counts of robbery, two counts of failing to attend Court and one count of uttering threats; he was convicted on 23 July 2008.

[3] The Applicant has been convicted of criminal offences both as a youth and as an adult and, in addition to the above-noted, his offences include: mischief; obstructing a peace officer; arson; break and enter; theft; possession of property obtained by crime under $5000 and over $5000; assault; taking a motor vehicle without consent; failing to attend Court; and failing to comply with a probation order.

[4] The Applicant is addicted to narcotics. He began experimenting with marijuana in his early teens and later developed a serious problem with cocaine. He abstained from narcotics consumption for two years, beginning in late 2005, during which time he had no criminal convictions. The end of his sobriety marked a recurrence of his criminal behaviour. Early in his sentence at Drumheller, the Applicant tested positive for marijuana consumption. However, he subsequently completed the

National Substance Abuse Program Moderate Intensity (NSAP) and the High Intensity Violence Prevention Program (HIVPP). He has been placed in a “drug-free” unit, is subject to random and frequent drug testing (which he routinely passes) and regularly attends Narcotics Anonymous meetings. In addition, while at Drumheller, the Applicant has completed his high-school equivalency.

[5] On 20 July 2009, the Canada Border Services Agency (CBSA) sent the Applicant a fairness letter, informing him about the admissibility process generally and inviting him to provide written submissions within 15 days of receiving the letter.

[6] On 1 March 2010, more than seven months later, the Applicant replied to the CBSA through counsel. He submitted 20 pages of written submissions and 118 pages of supporting documents and requested that his case not be referred to an admissibility hearing. The supporting documents included a psychological assessment from Dr. Patrick Baillie, dated 11 December 2009 and a Program Performance Report from the Drumheller Institution, dated 4 February 2010. On 4 March 2010, Applicant’s counsel sent an updated assessment from Dr. Baillie dated 2 March 2010, which was written as a result of the Applicant having completed the HIVPP.

[7] On 14 April 2010, the CBSA issued an admissibility report (Report), identifying the Applicant as criminally inadmissible under subsection 44(1) of the Act. On 12 July 2010, the Minister’s Delegate reviewed the Report and decided to refer the Applicant to the Immigration Division for a hearing to determine if the Applicant is inadmissible to Canada as a person described in subsection 36(1) of the Act. This is the Decision under review.

DECISION UNDER REVIEW

[8] The Report constitutes the reasons for the Decision. It reviews the Applicant's immigration background and his criminal record and enumerates the following factors, which were considered relevant to the admissibility process.

[9] The Applicant has no dependants and no known relatives outside Canada. He enjoys a good relationship with his parents, who describe him as a "changed person." The Applicant submits that he will face significant hardship in Serbia because of his Albanian ethnicity and his lack of familiarity with the language and the country.

[10] The judge who pronounced sentence upon the Applicant following his 2008 convictions made the following pertinent comments, which were noted in the Report. Judge Meagher observed that the Applicant has an extensive prior record and that his most recent crimes occurred while he was on judicial interim release with respect to other charges. These were identified as aggravating factors. However, Judge Meagher noted that the Applicant's youth, his early guilty pleas and his heretofore lack of federal incarceration were mitigating factors. The Report also notes that the Applicant's February 2009 Criminal Profile Report concludes that he is at a moderate risk of re-offending.

[11] The Report notes a number of points on which there is conflicting evidence. The February 2009 Criminal Profile Report states that the Applicant has responded to community supervision and support programs with non-compliance and recidivism. However, the February 2009 Correctional Plan states that the Applicant's problems with substance abuse have played a considerable role in his criminal history and that the Applicant appears motivated to address his addictions. There is also conflicting evidence of the Applicant's demeanour; some reports describe him as "pleasant and respectful," others as "rude" and "angry." Dr. Baillie concludes that the Applicant "will be at a relatively lower risk for re-offence on release if he is able to maintain abstinence from any use of street drugs or alcohol. He is motivated to do so …. [H]is risk for re-offence is very likely to be manageable in the community."

[12] The Report concludes:

> Despite the progress that Mr. Faci displays in detention, I note that he did reoffend in the past after being convicted of multiple criminal offences. He has indeed accumulated an extensive criminal record throughout the years. Mr. Faci has stopped using drugs in the past but relapsed after two years, committing more offences …. Mr. Faci's criminality shows an escalation in seriousness …. [H]is record shows many breaches of court ordered conditions. Based on Mr. Faci's past behaviour, I am not convinced that he would not recourse to drugs and crimes again once released from prison.
>
> Even though it would be emotionally difficult for his family if Mr. Faci is deported, I note that no one is dependent on him in Canada. … [I]t would certainly be difficult for Mr. Faci to adapt to a country he left while he was at a very young age and where he does not know anybody. On the other hand, Mr. Faci did poorly integrate into Canadian society as his disrespect of Canadian laws has shown. Overall, I am of the opinion that Mr. Faci's inadmissibility and lengthy criminal record outweighs (*sic*) the humanitarian and compassionate factors of his case.
>
> Mr. Faci alleged risks of persecution as a member of the Albanian minority in Serbia. Mr. Faci is a Convention Refugee in Canada and

> cannot be deported to Serbia unless he is found to be a danger to the public in which case, a risk assessment will be completed before any deportation order issued against him can be enforced.

[13] For these reasons, the Report recommended that the Applicant be referred to an admissibility hearing for serious criminality.

ISSUE

[14] The Applicant raises the following issues in his argument:

a. Whether the Minister's Delegate failed adequately to consider all relevant factors in deciding to refer the Applicant to an admissibility hearing;

b. Whether the Minister's Delegate's reasons, as set out in the Report, are adequate;

c. Whether the Decision was made in a procedurally fair manner.

STATUTORY PROVISIONS

[15] The following statutory provisions are applicable in these proceedings:

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	*a*) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou

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;

d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

(*b*) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

[…]

[…]

Preparation of report

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.

Rapport d'interdiction de territoire

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

(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

Suivi

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf

admissibility 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.	s'il s'agit d'un résident 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.

STANDARD OF REVIEW

[16] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the Court is well-settled by past jurisprudence, the reviewing Court may adopt that standard of review. Only where this search proves fruitless must the reviewing Court undertake a consideration of the four factors comprising the standard of review analysis.

[17] This Court held in *Lasin v Canada (Minister of Immigration and Citizenship)*, 2005 FC 1356 at paragraphs 18-19, and *Lee v Canada (Minister of Citizenship and Immigration)*, 2006 FC 158 at paragraph 20, that a Decision to refer an Applicant to an admissibility hearing under subsection 44(2) is reviewable on the patent unreasonableness standard. In *Dunsmuir*, above, the Supreme Court of Canada held that the reasonableness *simpliciter* and patent unreasonableness standards should be collapsed into a single "reasonableness" standard. Therefore, the appropriate standard of review for the issue in question is reasonableness. See also *Richter v Canada (Minister*

of Citizenship and Immigration), 2008 FC 806; and *Ranu v Canada (Minister of Citizenship and Immigration)*, 2011 FC 87. However, both this Court and the Federal Court of Appeal have provided significant guidance as to how the discretion to refer under subsection 44(2) should be exercised.

[18] At issue in this judicial review is whether the Minister's Delegate failed to consider adequately all relevant factors in deciding to refer Mr. Faci to an admissibility hearing pursuant to subsection 44(2),whether her reasons (as set out in the Report) are adequate, and whether she acted in a procedurally fair way.

[19] Two facts are particularly relevant to determining the Minister's Delegate's discretion in the circumstances: that Mr. Faci is a permanent resident and not a foreign national; and that he has been found to be inadmissible for serious criminality (as opposed to, for example, remaining in Canada beyond the period authorized by a visitor's visa). As the Federal Court of Appeal says in *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 at paragraph 23:

> Immigration is a privilege, not a right. Non-citizens do not have an unqualified right to enter or remain in the country. Parliament has the right to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. As a result, the Act and the Regulations treat citizens differently than permanent residents, who in turn are treated differently than Convention refugees, who are in turn treated differently than other foreign nationals.

[20] The minister's delegate may refer a report for an admissibility hearing where he or she is, in the words of subsection 44(2) of the Act, "of the opinion" that the report is well-founded. The jurisprudence is clear that this language suggests a standard of deference, a finding that has been

bolstered in some cases by an analysis of the limited right of appeal, the expertise of the minister's delegate, the balancing of society's interests and those of the applicant, and the highly fact-based and contextual nature of the question.

[21] A determination regarding the scope, if any, of the minister's delegate's discretion in subsection 44(2) of the Act is a question of law which attracts the standard of correctness. See *Cha*, above, at paragraph 16.

[22] The jurisprudence further suggests that the scope of the discretion afforded the minister's delegate under subsection 44(2) varies according to the facts of the case.

[23] *Awed v Canada (Minister of Citizenship and Immigration)*, 2006 FC 469, relies on *Cha* for the proposition that the scope of the minister's delegate's discretion under subsection 44(2) may vary depending on the grounds alleged or on whether the person concerned is a permanent resident or a foreign national. However, *Awed* finds in general that the scope of the discretion for both decisions is "very limited, reflecting Parliament's intention that non-citizens who commit certain types of crimes are not to remain in Canada."

[24] Justice Décary for the Federal Court of Appeal in *Cha* says: "There may be a [*sic*] room for discretion in some cases, and none in others. This is why it was wise to use the term 'may' [in subsection 44(2)]." However, he goes on to find, at paragraph 37, that the discretion is constrained by the Act:

> It cannot be, in my view, that Parliament would have in sections 36 and 44 of the Act spent so much effort defining objective

> circumstances in which persons who commit certain well defined offences in Canada are to be removed, to then grant the immigration officer or the Minister's delegate the option to keep these persons in Canada for reasons other than those contemplated by the Act and the Regulations. It is not the function of … the Minister's delegate when he acts on a report, to deal with matters described in sections 25 (H&C considerations) and 112 (Pre-Removal Assessment Risk) of the Act ….

[25] *Lee v Canada (Minister of Citizenship and Immigration)*, 2006 FC 158, and *Richter v Canada (Minister of Citizenship and Immigration)*, 2008 FC 806 (affirmed by the Federal Court of Appeal), both indicate that the minister's delegate may have some discretion to consider humanitarian and compassionate factors but that the decision under subsection 44(2) is not a full-blown humanitarian and compassionate review. The general consensus seems to be that the Act provides opportunities elsewhere for the applicant to raise H&C issues.

[26] In *Tran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1078, Justice Mosley relied on his decision in *Richter* to find that the duty of fairness for proceedings under section 44 is relaxed and consists of the right to make submissions and the right to obtain a copy of the report.

[27] In *Richter v Canada (Minister of Citizenship and Immigration)*, 2008 FC 806, Ms. Richter, like Mr. Faci, was a permanent resident of Canada who was convicted, *inter alia*, of a serious offence (in her case, trafficking in firearms). While in prison, she was interviewed by an immigration officer with respect to her immigration status. The officer then wrote a report, which recommended that Ms. Richter be referred to an admissibility hearing. The minister's delegate

considered the report and decided, pursuant to section 44(2), that the report was well-founded and that it should be referred for an admissibility hearing.

[28] At issue in the judicial review was the decision of the officer to prepare a report and the decision of the delegate to refer the report for an admissibility hearing. Justice Mosley observes that subsections 44(1) and (2) of the Act state that the decision maker is empowered to act where he or she is "of the opinion" which, in Justice Mosley's view, indicates the legislature's intention to afford deference to the decisions. Therefore, he found that the appropriate standard of review for the decision of the officer and the minister's delegate is reasonableness.

[29] At paragraphs 11-13, Justice Mosley relies on *Correia v Canada (Minister of Citizenship and Immigration)*, 2004 FC 782, to find that the officer's discretion under subsection 44(1) not to prepare a report is extremely limited. He relies on his own decision in *Awed v Canada (Minister of Citizenship and Immigration)*, 2006 FC 469, as authority for the proposition that the objective of an officer in conducting an interview under subsection 44(1) is simply to confirm whether or not there are facts to support an opinion that a permanent resident or foreign national present in Canada is inadmissible.

[30] Justice Mosley finds that, where the facts support a finding of inadmissibility, the officer must prepare a report; she is not empowered by the statute to exercise discretion. Further, the officer is not authorized by the Act to assess personal factors. Where such an assessment is carried out but does not affect the outcome, however, the decision to issue a report need not be set aside. Justice Mosley added, at paragraph 22, that the applicant's expressions of remorse or lack thereof are irrelevant to the officer's duty under subsection 44(1):

> There is nothing in the plain language of the enactment to suggest that Parliament intended that officers be given the discretion to consider whether convicted offenders regretted their crimes and should thereby be exempted from the inadmissibility provisions of the Act in determining whether to issue a report.

[31] Justice Mosley then turns his attention to the decision of the minister's delegate to refer the report to an admissibility hearing. He relies on the Federal Court of Appeal decision in *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, to find that the scope of the minister's delegate's discretion depends on whether the person in question is a foreign national or a permanent resident. If the person in question is a foreign national, then the minister's delegate has no discretion to refer the report for an admissibility hearing. If the person in question is a permanent resident, then "the question was left open whether some minimal amount of discretion was available." See Richter FC at paragraph 14. In Ms. Richter's case, Justice Mosley finds that the minister's delegate did consider H&C factors and that the decision to refer to an admissibility hearing was reasonable. I conclude from this that Justice Mosley accepts that minister's delegate can exercise "minimal discretion" and consider H&C factors without rendering unreasonable the decision to refer the report for an admissibility hearing.

[32] With respect to procedural fairness, Justice Mosley finds, at paragraphs 18-19 and 24 that procedural fairness with respect to proceedings under section 44 is "relaxed," in accordance with *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, and consists of the right to make submissions and the right to obtain a copy of the report. Immigration officials have no heightened duty of fairness when dealing with a person in custody, even though that person's liberty is restricted. He further states that adequate reasons are those that permit the person about whom the decision was made to understand the basis for that decision.

[33] In *Richter v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 73, in an 11-paragraph decision, the Federal Court of Appeal found that Justice Mosley made no reviewable error and substantially adopted his reasons.

[34] In *Tran*, above, Mr. Tran, like Mr. Faci, was a permanent resident of Canada. A deportation order was made after a hearing was conducted in which he was found to be inadmissible. The reasons, written by Justice Mosley, address the procedural fairness of three proceedings: 1) the decision under subsection 44(1) to prepare an admissibility report; 2) the decision under subsection 44(2) to refer the report for an admissibility hearing; and 3) the deportation order.

[35] The applicant in *Tran* received a letter informing him about the admissibility hearing and inviting him to make submissions, which he did. The officer then interviewed the applicant and made notes. The officer confirmed the applicant's criminal convictions and drafted a report stating that he was inadmissible. This report was sent to the minister's delegate, who adopted the report as her reasons and referred the report for an admissibility hearing. The admissibility hearing took place and a deportation order was issued.

[36] The applicant in *Tran* argued that the report and the notes which the officer took during the interview should have been disclosed to him before the minister's delegate made the decision to refer the report for an admissibility hearing. If the applicant had received these documents, he argued, he could have made submissions on that information and perhaps persuaded the delegate

not to refer the report. Justice Mosley noted that the applicant did not request the report nor did he request the notes which the officer took during the interview.

[37] Justice Mosley found that there was no breach of procedural fairness. The information contained in the report and the notes was information that the applicant already had or knew about. Justice Mosley relied on his decision in *Richter FC* that the duty of fairness for proceedings under section 44 is relaxed and consists of the right to make submissions and the right to obtain a copy of the report. This duty was fulfilled in the applicant's case. Justice Moseley stated at paragraph 21:

> There was no clear and specific request for delivery of such material made by the applicant before either the referral decision or the admissibility hearing. No request was made by the applicant for an explanation of the 44(1) and 44(2) decisions. In my view, the applicant can not be heard now to complain about the failure to disclose the officer's notes or to provide such an explanation when he did not request that they be produced.

[38] When reviewing a Decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the Decision-making process [and also with] whether the Decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

The Minister's Delegate Failed to Consider Relevant Factors

[39] The Applicant argues that the Minister's Delegate erred in failing to consider two relevant factors: the conditions in the Applicant's home country; and the Applicant's rehabilitation. This Court has made clear that, in a matter such as this, a reasonable decision is one in which the Minister's Delegate has considered all relevant factors. See *Poonawalla v Canada (Minister of Citizenship and Immigration)*, 2004 FC 371 at paragraph 15; and *Lee*, above, at paragraph 53. Moreover, Chapter 6 of the *Inland Enforcement Manual* (ENF 6) clearly states that, prior to referring a permanent resident to an admissibility hearing, the Minister's Delegate should consider several relevant factors, including conditions in the permanent resident's home country.

[40] In the instant case, the Applicant provided detailed documentary evidence that recognized the significant difficulties faced by ethnic Albanians and the inadequacy of the protection provided by Serbian authorities. The failure of the Report to address and of the Minister's Delegate to consider this highly relevant factor is evident in the comment in the Report that, as the Applicant is a Convention refugee, he cannot be deported to Serbia before a risk assessment has been undertaken. This does not constitute proper consideration; the Minister's Delegate has allowed her duty to weigh this factor to be shifted to a Pre-Removal Risk Assessment officer at some later date.

[41] The Minister's Delegate also failed properly to consider the relevant factor of rehabilitation. The Report states: "Based on Mr. Faci's past behaviour, I am not convinced that he would not recourse to drugs and crimes again once released from prison." ENF 6 requires the Minister's Delegate specifically to consider whether an applicant has completed any rehabilitation programs. In the instant case, the Applicant has completed at least two rehabilitation programs directly related to his rehabilitation: the NSAP and the HIVPP. The Report fails to even mention the latter. It also fails to acknowledge that, while the Applicant had previously relapsed, he had not at that time received any formal treatment or assistance in dealing with his addictions.

[42] Further, the list of documents considered by the Minister's Delegate does not include Dr. Baillie's updated psychological assessment from March 2010, which was written in light of the Applicant's completion of the HIVPP. The Applicant submits that the only conclusion to be drawn is that these materials were not considered by the Minister's Delegate. These are glaring omissions. The HIVPP was a "centrepiece" of the Applicant's rehabilitation efforts; Dr. Baillie's updated assessment demonstrated that the Applicant's participation in the HIVPP would further reduce his chance of re-offending. The Minister's Delegate should have considered it and, because she did not, the Decision is unreasonable.

The Respondent

The Minister's Delegate Considered All Relevant Factors

Country Conditions

[43] The Respondent challenges, on three grounds, the Applicant's statement that the Minister's Delegate committed a reviewable error in failing to consider conditions in the Applicant's country of origin.

[44] First, the reasons of the Minister's Delegate, as stated in the Report, do consider the Applicant's "alleged risks of persecution as a member of the Albanian minority in Serbia." The Report concludes that the Applicant cannot be deported to Serbia unless found to be a danger to the public, in which case a risk assessment will first be undertaken.

[45] Second, the Applicant's reliance on ENF 6 is unfounded. Contrary to the Applicant's assertions, this manual is a guide, not a dictate or a law. Further, the public policy considerations in the manual are not binding upon the Minister and his agents. See *Ziaei v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1169 at paragraph 20; *Lee*, above, at paragraphs 44-50; and *Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2, 137 DLR (3d) 558.

[46] Third, the Applicant's home country conditions are neither an appropriate nor a relevant factor in this Decision. As the Report correctly states, there are separate and parallel schemes for removal orders and removal risk assessments for persons such as the Applicant. The subsection 44(1) report and subsection 44(2) referral are precursors to a removal. Removal risk factors are considered in a separate, judicially reviewable decision under subsection 115(2) of the Act. See *Lasin*, above, at paragraphs 17-19; *Lee*, above, at paragraphs 26-29; and *Richter v Canada (Minister of Citizenship and Immigration)*, 2008 FC 806 at paragraphs 12-15, aff'd 2009 FCA 73.

Rehabilitation

[47] The Applicant argues that the Minister's Delegate committed a second reviewable error in failing to consider the Applicant's rehabilitation. The Respondent again submits that the Report addresses this point specifically and clearly. The Applicant's argument is an invitation to the Court to re-weigh the rehabilitation factor. This is not the purpose of judicial review. The question is not whether the Minister's Delegate gave enough weight to the relevant factors or properly applied the guidelines. The question is whether there is any evidence that the Minister's Delegate actually failed to consider the appropriate factors. The Respondent contends that there is no such evidence in the instant case. See *Poonawalla*, above, at paragraphs 14-15; and *Lee*, above, at paragraph 46.

[48] Contrary to the Applicant's submission, the "Documents Attached" section of the Report specifically lists the Program Performance Report (the HIVPP). Even if it did not, however, failure to mention a particular document is not fatal to the Decision. The Minister's Delegate is assumed to have considered all of the evidence unless the contrary is shown. See *Akram v Canada (Minister of Citizenship and Immigration)*, 2004 FC 629 at paragraph 15.

[49] The Respondent acknowledges that Dr. Baillie's updated psychological assessment, dated 2 March 2010, is not listed in the "Documents Attached" section of the Report. However, even assuming that the Minister's Delegate did not consider it, the omission is not "glaring"; it is immaterial for the following three reasons.

[50] First, the updated assessment reaches almost exactly the same conclusion as the 11 December 2009 assessment, which was considered and which concludes that "[the Applicant's] risk

for re-offence is very likely to be manageable in the community." The updated assessment concludes that "the program participation is likely to have a positive impact with respect to reducing [the Applicant's] potential for re-offence." In short, the updated opinion says nothing new and would not have materially affected the Decision.

[51] Second, the updated assessment merely summarizes the HIVPP, which was before the Minister's Delegate.

[52] Third, the procedural fairness implication of this argument is that the Applicant is not only entitled to make submissions before the subsection 44(1) report is prepared, he is also entitled to make additional (and late) submissions. However, as has been repeatedly held by this Court, "the duty of fairness owed for the proceedings under section 44 of IRPA are (*sic*) relaxed and consist of the right to make submissions and to obtain a copy of the report." See *Richter*, above, at paragraph 18, aff'd 2009 FCA 73; and *Tran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1078 at paragraph 16.

Conclusion

[53] The Respondent submits that the Supreme Court of Canada held in *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711, [1992] SCJ No 27 (QL) at page 715, that Parliament has the right to enact legislation prescribing the conditions under which non-citizens may remain in Canada. One condition is that they not be convicted of an offence for which a term of imprisonment of ten years or more may be imposed. The Court held unanimously that this condition

represents a legitimate, non-arbitrary choice by Parliament. If an individual deliberately violates this condition, there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada. Deportation is how this is accomplished. It is not necessary, in order to comply with fundamental justice, to look beyond the serious conviction to other aggravating or mitigating circumstances.

The Applicant's Reply

[54] The Applicant submits that, although the Report states that a risk assessment will have to be conducted before the Applicant could be deported, a statement about future events does not fulfill the duty of the Minister's Delegate to consider all relevant factors, including the conditions in the Applicant's home country.

The Respondent's Further Memorandum

[55] The Respondent challenges the Applicant's submission that the Minister's Delegate was duty-bound to consider home country conditions and removal risks. The Applicant's argument misconstrues the legislative scheme and confuses the Delegate's comparatively narrow discretion under subsection 44(2) with the wider discretion under paragraph 115(2)(*a*), which is described at length in *Hasan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1069 at paragraphs 10 and 21-22. In short, the Applicant's argument is premature. It calls for the consideration of factors that are properly assessed only after there has been an inadmissibility determination and paragraph 115(2)(*a*) has been engaged.

[56] The Respondent also challenges the Applicant's statement that Dr. Baillie's updated assessment dated 2 March 2010 was "highly relevant" and that the failure of the Minister's Delegate to consider it before rendering her Decision was a "glaring omission" and a reviewable error. The Respondent points out that, in an affidavit dated 11 January 2011, the Minister's Delegate confirms that the updated assessment and its accompanying letter were not before her when she rendered her Decision but that neither document would have changed her Decision as they add no "significant new facts." The updated assessment and accompanying letter are therefore immaterial.

[57] Finally, the Respondent observes that the Supreme Court of Canada, in *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at paragraph 10, recognized that the Act has made security a priority and, in so doing, requires permanent residents, such as the Applicant, to respect Canadian laws:

> The objectives as expressed in the *IRPA* indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security …. Viewed collectively, the objectives of the *IRPA* and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.

The Respondent submits that, in light of the Supreme Court's finding, the Applicant's criminal conduct warrants an admissibility hearing.

ANALYSIS

[58] The Applicant says that the Decision is unreasonable because the Minister's Delegate failed to consider relevant factors.

[59] First of all, relying upon ENF 6, the Applicant says that the Minister's Delegate failed to consider conditions in the Applicant's home country.

[60] As the Report makes clear, the Delegate did turn her mind to this issue but decided that risk assessment could be left to a later decision because

> Mr. Faci is a Convention Refugee in Canada and cannot be deported to Serbia unless he is found to be a danger to the public in which case, a risk assessment will be completed before any deportation order issued against him can be enforced.

[61] The Applicant says that the Minister's Delegate should not have dealt with this issue in this way and should have considered and taken into account the country conditions documents that were submitted.

[62] Even if I were to agree with the Applicant that, when considering whether to refer a permanent resident to an admissibility hearing, the Minister's Delegate may consider all "relevant" factors in making a Decision, in my view, country conditions in Serbia were not relevant to this Decision because the Applicant cannot be deported to Serbia. The Minister's Delegate is not obliged to speculate about how and when a future deportation might take place. The country

conditions documentation submitted by the Applicant may well not be applicable if and when deportation is considered. And it is clear that the risks feared by the Applicant will have to be given full consideration at the appropriate time before he can be deported.

[63] The jurisprudence of this Court makes clear that, when deciding whether to recommend an admissibility hearing, the Minister's Delegate has the discretion, not the obligation, to consider the factors set out in ENF 6. See *Lee*, above, at paragraph 44; and *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429 at paragraphs 22-23. The Minister's Delegate in this case reasonably concluded that country conditions need not be considered at this stage of the process because a risk assessment would have to be done before the Applicant could be removed.

[64] The Applicant says that the Minister's Delegate also failed to consider the Applicant's rehabilitation.

[65] It is clear from the Report that the Minister's Delegate considered the Applicant's rehabilitation in considerable detail. In fact, the "Documents Attached" section of the Report refers to the 4 February 2010 HIVPP that the Applicant says was left out of account. There is nothing in the Report to suggest that the Minister's Delegate failed to take into account the HIVPP, or the fact that the Applicant had never had any treatment until completing the NSAP and HIVPP at Drumheller, as part of her detailed consideration of rehabilitation. In fact, the Report says that the Applicant has "successfully completed rehabilitative programs"; it even quotes from the HIVPP report.

[66] The Applicant also says that the Minister's Delegate failed to take into account Dr. Baillie's updated psychological assessment of March 2010, which was written in light of the Applicant's completion of the HIVPP program.

[67] In her affidavit of 11 January 2011, the Minister's Delegate confirms that Dr. Baillie's updated assessment and counsel's accompanying letter were not before her when she rendered her Decision. The Report is dated 14 April 2010, the Decision is dated July 2010 and the letter from counsel with the updated assessment is dated 4 March 2010. There is no explanation from either side as to why the updated report was not before the Minister's Delegate. She was not cross-examined on her affidavit. At the hearing it became clear that the materials were submitted after the stated 15 days had been extended to 1 March 2010 and that counsel did not follow up to discover whether the late filing was acceptable or to request a further extension. In these circumstances I cannot say that procedural unfairness occurred, particularly having regard to the "relaxed" nature of procedural fairness in this context. See *Tran*, above

[68] The Respondent says that the updated psychological report and counsel's submissions are immaterial because neither of them could have affected the outcome of the Decision. The Minister's Delegate also says that this in her affidavit. I will not consider this aspect of the affidavit.

[69] The Minister's Delegate was obviously aware of the 4 February 2010 HIVPP, so materiality in this context depends upon what Dr. Baillie said in his updated assessment of 2 March 2010.

[70] In his 11 December 2009 assessment, Dr. Baillie had concluded that the Applicant "will be at relatively lower risk for re-offence on release if he is able to maintain abstinence from any use of street drugs or alcohol," and that the Applicant's "risk for re-offence is very likely to be manageable in the community." The 2 March 2010 update concludes that "the program participation is likely to have a positive impact with respect to reducing [the Applicant's] potential for re-offence."

[71] It is difficult to be precise about what Dr. Baillie's update adds to his previous opinion. He quotes and summarizes the report, which the Minister's Delegate has read, and adds a brief paragraph on what the report suggests to him. It seems to me that he is saying that the Applicant's completion of the HIVPP is a further positive factor that supports his assessment of the Applicant's sincere motivation and that risk of his re-offending is low and "manageable in the community." In other words, Dr. Baillie's assessment of risk does not change. It is simply further supported by the HIVPP.

[72] Dr. Baillie's assessment of risk is canvassed fully in the Report and is taken into account in the overall assessment. It appears to me, then, that the updated report from Dr. Baillie did not change the picture with regard to Dr. Baillie's assessment of rehabilitation and the likelihood of the Applicant's re-offending. Hence, I do not believe that anything material to the Decision was left out of account or that a breach of procedural fairness occurred through the failure of the Minister's Delegate to consider Dr. Baillie's update. She had the completion of the HIVPP before her and she had Dr. Baillie's assessment on rehabilitation. Both were taken into account in the conclusions.

[73] The Applicant has raised inadequate reasons as a ground of review but has made no submissions on point. There is, in any event, nothing inadequate about these reasons.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4722-10
STYLE OF CAUSE:	**ROBERT ROCKY FACI** **and** **THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	February 17, 2011
REASONS FOR JUDGMENT AND JUDGMENT	**Russell J.**
DATED:	June 14, 2011

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