Federal Court  Cour fédérale

Date: 20130918

Docket: IMM-7316-12

Citation: 2013 FC 960

Ottawa, Ontario, September 18, 2013

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

ABDULAQADIR MAGAN
(SAIAD ABDI)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the IRPA) of the decision dated July 5, 2012, of Chuck Desjarlais, Enforcement Officer (the Officer) at Canada Border Services Agency (CBSA) to issue an exclusion order against Abdulaqadir Magan (the Applicant) for inadmissibility to Canada pursuant to subsection 41(a) and paragraph 20(1)(a) of the IRPA.

I. Preliminary Issues

A. *Which Decision?*

[2] Prior to hearing the parties' argument, it was necessary to sort out exactly which decision was before the Court. In the Application for Leave and Judicial Review, found at page 1 of the Application Record, it said to review a decision dated July 15, 2012, and yet the decision found in the Application Record at page 4 was dated June 12, 2012. At the hearing, I confirmed with both parties that the actual decision to be reviewed is that found in the Application Record at pages 45 and 46 and is dated July 5, 2012.

B. *Hearing Update*

[3] I asked if the Applicant was still being detained and was told that he has since been removed to the United States of America and was incarcerated there for criminal convictions.

[4] The Respondent, in a letter dated April 29, 2013, quashed the June 12, 2012 decision (IMM-7378-12), having determined that the Applicant's claim for refugee protection in Canada became ineligible for referral to the Refugee Protection Division of the Immigration and Refugee Board (the Board) upon the undertaking that the Applicant discontinued the judicial review of IMM-7378-12.

C. *Amendment to the Style of Cause*

[5] The Respondent brought to my attention that the style of cause incorrectly refers to the Respondent as the Minister of Citizenship and Immigration, and that it should be amended to replace the Respondent as the Minister of Public Safety and Emergency Preparedness. In a letter subsequent to the hearing, the parties agreed that the style of cause should be amended. The

amendment is by the authority of "Order Setting out the Respective Responsibilities of the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness Under the Act", SI/2005-120. The style of cause will be amended naming the Respondent as "The Minister of Public Safety and Emergency Preparedness".

II. Background

[6] The Applicant was picked up by CBSA on June 11, 2012, while walking along a highway in southern Manitoba. He appeared to speak little English and said only "Winnipeg" and "Help", although the officers who first interacted with him noted that they suspected his English was better than he was attempting to portray.

[7] On June 11, 2012, the Applicant was interviewed by CBSA at Emerson, Manitoba, the Applicant's port of entry into Canada. Officer Desjarlais and Officer Olivier-Job, were in attendance at the interview. At that time, the Applicant stated that he was Abdulqadir Magan, born January 25, 1984, and that he wanted to make a refugee claim against Somalia. He also stated that he had been in the United States for the last two months, and prior to that had been working in Kenya and Nairobi. Finally, he stated that he had no friends or family in Canada, and that he had never been convicted of a crime in any country. When advised of his right to counsel, the Applicant refused, and said that he may seek counsel at a later date.

[8] Following the interview, the Applicant was arrested based on CBSA's determination that the Applicant would be unlikely to appear for further examination. The two officers then drove the Applicant to Winnipeg. While en route, Officer Olivier-Job received information from the United

States Customs and Border Control, via another CBSA officer, indicating that a fingerprint match identified the Applicant as Saiad Abdi (also referred to as Saaid Abdi), who was a United States permanent resident with a lengthy criminal record. When they arrived in Winnipeg, the officers escorted the Applicant to the Winnipeg Remand Centre to be kept in immigration detention.

[9] On June 12, 2012, following the receipt of further information, Officer Olivier-Job found the Applicant to be ineligible for refugee protection in Canada. He wrote a report under subsection 44(1) of the IRPA alleging that the Applicant was inadmissible to Canada pursuant to subsections 41(a) and 20(1)(a) of the IRPA, for failure to hold the required visa or other document necessary under the regulations in order to establish permanent residence in Canada.

[10] The Applicant's file was subsequently assigned to Officer Desjarlais, in his capacity as a delegate of the Minister, to make a determination under subsection 44(2) of the IRPA as to whether the inadmissibility finding was well-founded. Upon reviewing the contents of the Applicant's file, the Officer found that the Applicant's fingerprints had been matched to a set obtained in the United States from a Saiad Abdi, born December 30, 1981 in Somalia. Saiad Abdi made an asylum claim against Somalia in the United States on May 28, 2003, which was granted on May 4, 2004. He became a permanent resident of the United States at that time, and was issued a permanent resident card, valid until January 13, 2019. The file also contained information that Saiad Abdi's known aliases were Abdulqadir Magan, and Abdulqadir Osman.

[11] The Officer set up an appointment with the Headingley Correctional Centre (HCC), where the Applicant was now being held, to conduct the Minister's Delegate's review on June 19, 2012.

[12] The Officer informed Lesley Heinrichs, the lawyer who had represented the Applicant at his 48 hour detention review, of the appointment, who advised that she would not be in attendance. She had explained that as Legal Aid does not pay for her time to go out to HCC for such a hearing, if the hearing does not go ahead that she typically does not attend them. She asked that after the review she be provided with the relevant documents.

[13] On June 19, 2012, the interpreter that the Officer had scheduled to attend the review cancelled. The Officer decided to attend the review anyhow in case the Applicant was willing to proceed without an interpreter. However, the Applicant did not want to proceed without an interpreter. The Officer therefore adjourned the review, but before leaving attempted to confirm the Applicant's identity. The Applicant insisted that his name was Abdulqadir Magan. The Officer showed him photos of an individual from the state of Ohio with the name Saiad Abdi, DOB December 20, 1981. The photos had been obtained by CBSA (which had in turn been obtained through a fingerprint match), were provided by the United States Customs and Border Control Agency. While the individual in the photos looked identical to the Applicant, the Applicant insisted that Saiad Abdi, the man in the photos, was not him.

[14] Lesley Heinrichs sent a letter to CBSA dated June 20, 2012, explaining she was investigating the possibility of the Applicant's relatives posting bonds, and she was in the process of obtaining names.

[15] The Officer rescheduled the review for June 22, 2012; however, on June 21, 2012, he received a call from HCC that the Applicant was under "respiratory caution" and would have to remain in isolation, so the June 22, 2012 appointment was cancelled.

[16] On July 3, 2012, the Officer made an appointment at HCC for July 5, 2012. Lesley Heinrichs (who had provided a "Use of Representative" form to the Officer on June 20, 2012 in anticipation of the June 22, 2012 appointment) was advised of the new date by telephone. She did not indicate that she was no longer representing him. She did not attend the July 5th, 2013 hearing, but in light of the explanation she gave earlier, the Officer did not consider this to be out of the ordinary.

[17] When the Officer began the review, the Applicant advised him that he did not wish to answer any questions, and wanted his lawyer to answer questions for him. The Officer informed him that Lesley Heinrichs would not be attending the review, at which time the Applicant advised him that David Matas was his lawyer. This was the first time that the Officer had heard that David Matas was the Applicant's lawyer. The Officer believed that the Applicant was trying to further delay the review, because:

i) The Officer had not previously been advised that David Matas was the Applicant's lawyer;

ii) The Officer had received a "Use of Representative" form from Lesley Heinrichs;

iii) Lesley Heinrichs had not advised the Officer that she was no longer representing the Applicant; and

iv) The Applicant had been uncooperative with CBSA according to various emails on file.

[18] The Officer therefore informed the Applicant that he was prepared to proceed with the review without the Applicant's cooperation.

[19] The allegation contained in Officer Olivier-Job's subsection 44(1) report that formed the basis for the Officer's review, was that the Applicant was a foreign national who was seeking to remain in Canada without the required documentation to do so. According to Officer Olivier-Job, when the Applicant was interviewed at Emerson, Manitoba on June 11, 2012 and asked why he was in Canada, he answered "Peace. Refugee claim against Somalia." The Officer therefore determined that the Applicant was seeking to remain in Canada.

[20] The Officer knew from his interaction with the Applicant at Emerson on June 11, 2012, that the Applicant did not have any documentation, which was confirmed in an email from CBSA Officer Darren Kreller, who had initially arrested the Applicant in Canada. The Officer also determined that the Applicant was indeed Saiad Abdi. The basis for that finding was verbal confirmation of the fingerprint match that had been obtained by Officer Olivier-Job, as well as the information and photographs obtained from the Ohio Attorney General.

[21] The Officer told the Applicant that he found him to be described as in the subsection 44(1) report and issued an exclusion order. The Applicant refused to sign the order and the interpreter signed as a witness to that fact.

[22] Upon return to his office, the Officer called David Matas and informed him that the Applicant had stated that David Matas was representing him. David Matas advised that he was

indeed representing the Applicant. The Officer explained that he did not have a "Use of Representative" form from him regarding the Applicant, but in good faith the Officer shared the details of his dealings with the Applicant with David Matas verbally in exchange for a "Use of Representative" form.

[23] The following day, July 6, 2012, the Officer received a fax from David Matas, including the "Use of Representative" form. The Officer noted that the form had been faxed to the Appeals office and not the CBSA Winnipeg's Hearings Unit on June 26, 2012, which explains the delay in receipt of receiving it. However, there were no notations regarding this in the Applicant's CBSA paper file, nor in "FOSS", CBSA's electronic database of information. The Officer then faxed and emailed all relevant documents to David Matas, who confirmed receipt via email.

III. Issue

[24] Whether the duty of fairness was breached because the Applicant was denied the right to counsel?

IV. Standard of review

[25] The appropriate standard of review for issues of procedural fairness is correctness (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 43) and as such, no deference is owed to the Officer (*Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 53).

V. Applicant's Position

[26] The Applicant submits that he was not advised of his right to counsel prior to the July 5, 2012, Minister's Delegate's review, and that his lawyer was not notified of the review. The Applicant claims he did not know what was happening at the review and asked for the interview to stop so he could contact his counsel but the officer refused.

[27] Immigration Manual ENF6 "Review of Reports under A44(1)" (the Manual) provides that "[p]ersons do not have a right to counsel at removal order determinations and eligibility determinations, unless they are detained. In all cases, however, persons must be given the opportunity to obtain counsel at their own cost." Thus the Manual obliges the Officer to inform persons of their right to counsel prior to commencing the interview.

[28] The Applicant submits that though the Manual cannot impose substantive duties on the Respondent contrary to the IRPA, that there is a legitimate expectation that this procedure will be followed. The Manual is available to the public, so it is reasonable to conclude that a directly affected person has an expectation that the Manual procedures will be included in the duty of fairness afforded each person. The Applicant argues that failure to follow this procedure violates the duty of fairness: see *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

[29] At the hearing, the Applicant provided a number of cases where applicants had requested adjournments when they had no counsel at Refugee Protection Hearings.

[30] The Applicant in oral argument submitted that the eligibility matter should be re-determined, since, in his view, if this matter was sent back a different result may be possible.

[31] The Applicant says that under the conditional removal order under subsection 49(2) of the IRPA, he could obtain after a successful eligibility hearing, is different than the unconditional removal order he received following the Minister's Delegate's review. The argument is that it is not for me to determine the outcome of his status with different sequencing or his status in the United States in the future.

VI. Respondent's Position

[32] The Respondent agrees that a person in detention has to be notified of the right to counsel for a Minister's Delegate's admissibility review, and on these facts submits the Applicant's right was respected.

[33] The Respondent submits that as set out in the affidavit of the Minister's Delegate Officer Desjarlais, the Applicant had been represented by Lesley Heinrichs at prior hearings and she had provided the Officer with the "Use of Representative" document. The Officer had communicated with Lesley Heinrichs several times regarding the Applicant and scheduling admissibility review. She had indicated she was representing the Applicant, but that she would not be attending. Before the hearing, the Officer was not told by either Lesley Heinrichs, or David Matas that the Applicant had changed counsel.

[34] A Somali translator was provided even though the Applicant's English appeared to be much better than he claimed, as evidenced by the transcripts of prior hearings. The Applicant had not indicated he did not understand the translator.

[35] The Respondent further submits that even if this Court finds that the Applicant's right to counsel was breached, that this matter should not be sent back as the result of this particular hearing was inevitable.

[36] The inadmissibility allegation in this case was that the Applicant was a foreign national in Canada without the required visa or other documentation. The evidence relied on by the Officer in making his determination was that the Applicant had no documentation in his possession upon entering Canada, and he stated at the port of entry that his reason for being in Canada was "[p]eace" and to make a "[r]efugee claim against Somalia". Further, despite the Applicant's statements that he was not Saiad Abdi, the Minister had solid evidence that he was in fact that person. The Respondent submits that sending this matter back for re-determination in front of a different officer would result in exactly the same result, given the provisions in the IRPA.

[37] The Respondent disagrees with the Applicant's argument that the new eligibility hearing will change anything and submits the results are inevitable as a result of the evidence on hand that establishes the Applicant's inadmissibility to Canada. The Applicant has convictions in the United States for improper handling of a weapon in a motor vehicle and a warrant for not attending a sentencing on a different matter. He has traffic violations starting in 2007, and continued interactions with the criminal justice system right through to his arrest in Minnesota in April 2012.

The Respondent said if on re-determination the Applicant is determined to be admissible to Canada, (which is unlikely given the evidence above), then at best he would still be subject to a removal order. While the particular type of removal order in those circumstances may differ, the end result would be exactly what occurred in that the Applicant was removed to the United States of America.

VII. Analysis

[38] I do not find that there was a breach of procedural fairness on these very unique and particular facts.

[39] The Applicant had been informed of his right to counsel when he was first arrested on June 11, 2012, and had retained counsel that had filed a representative form. The Officer had been in touch with his counsel to inform her of every hearing date but did not give him rights to counsel at every stage of the process. I find that he was not obligated to do so (*Rebmann v Canada (Solicitor General)*, 2005 FC 310 at para 13 and *Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FCA 126 at paras 54-55).

[40] There is no evidence that the Applicant did or did not inform David Matas of the hearing date. The only evidence is that David Matas did not attend the hearing though he had presumably been retained by the Applicant on or before June 26, 2012.

[41] There is no evidence from Lesley Heinrichs as to when she was no longer his counsel. We have evidence that the Officer had been told by Lesley Heinrichs that she did not attend these hearings. We have correspondence from her dated June 20, 2012, where she is attempting to find

the Applicant's relatives for bail and she indicated that she is continuing to look. We have evidence that she was contacted on July 3, 2012 with notice of the hearing to take place on July 5, 2012. We have no evidence that she responded to that call indicating she was not his counsel.

[42] It is clear from the material filed that the decision maker considered the factors in *Siloch v Canada (Minister of Employment and Immigration)* (1993), 151 NR 76 (FCA) before he proceeded with the hearing even though those factors were set out in the context of a RPD hearing and now codified in subsection 48 of the IRPA and are not applicable to this decision. It was a Minister's Delegate, Inland Enforcement Officer doing an IRPA s. 44 admissibility review and not an RPD hearing.

[43] With no notice of any change in solicitors clearly there was no procedural unfairness. Accepting the Applicant's submission on these extraordinary facts would be to put no responsibility on the Applicant, and place the burden entirely on the Respondent for matters well outside his control or role. There must be some responsibility on the Applicant to ensure if he wants counsel at his hearing to retain them to do so.

[44] The Officer proceeded with the hearing without David Matas but he did so believing that the Applicant was represented by Lesley Heinrichs as he had a valid representative form and with confirmation that the Applicant's counsel would not be appearing, and David Matas not contacting them to tell them otherwise. This was done in the context that the Applicant had been less than forthcoming in other dealings and had previously attempted to delay matters.

[45] Even if I had found that there was a breach of fairness, this matter is the exceptional case that would be dismissed as the outcome of the case was inevitable (*Yassine v Canada (Minister of Employment and Immigration)* (1994), 27 ImmLR (2d) 135 (FCA) refers at para 9 to the SCC in *Mobil Oil Canada Ltd et al v Canada Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at para 228; *Nagulathas v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1159 at para 24).

[46] I find there was no procedural unfairness and dismiss this application.

[47] Certified Question submitted by Applicant's counsel: "Should an application for judicial review of a decision be dismissed despite the breach of a duty of fairness where the conclusion, without the breach, would have been the same or only where the conclusion, without the breach, would, in a re-determination, be the same?"

[48] I will not certify this question as it is not a serious question of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to replace Minister of Citizenship and Immigration as the Respondent with the Minister of Public Safety and Emergency Preparedness.
2. The Application is dismissed;
3. No questions are certified;
4. No costs are awarded.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE: Magan v. MCI

PLACE OF HEARING: WINNIPEG, MANITOBA

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REASONS FOR JUDGMENT AND JUDGMENT: MCVEIGH J.

DATED: SEPTEMBER 18, 2013

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