Federal Court  Cour fédérale

Date: 20141215

Docket: IMM-6376-13

Citation: 2014 FC 1219

Ottawa, Ontario, December 15, 2014

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

CARLO FABBIANO

Applicant

and

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

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Mr Carlo Fabbiano was born in Italy in 1957, but has lived in Canada since 1963. He applied for Canadian citizenship in 2005, but it was never granted.

[2] During the 1990s, Mr Fabbiano "became" involved with the Hells Angels. He was convicted of drug trafficking in 1999 and served a one-year sentence in the community. In 2006, a representative of the Canadian Border Services Agency (CBSA) wrote to Mr Fabbiano informing him that, as a member of a criminal organization, he might be inadmissible to Canada (according to s 37(1)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] – see Annex for provisions cited).

[3] In 2008, sixteen months after Mr Fabbiano had made submissions to the CBSA on the subject of his admissibility, an enforcement officer recommended that Mr Fabbiano be referred for an admissibility hearing (relying on s 44(1) of IRPA). A senior CBSA analyst concurred with that recommendation. In 2009, a delegate of the Minister of Public Safety and Emergency Preparedness referred Mr Fabbiano for an admissibility hearing (under s 44(2) of IRPA). Mr Fabbiano did not learn of any of these decisions until 2013. By way of this application for judicial review, Mr Fabbiano challenges the Minister's delegate's decision.

[4] Mr Fabbiano argues that the delay in notifying him of the delegate's decision constitutes an abuse of process. Further, he alleges that the proceedings are abusive because they were commenced as a form of reprisal for his refusal to act as an RCMP informant. He also claims that he was treated unfairly, and that the delegate's decision was unreasonable. He asks me to stay the admissibility proceedings, or to quash the decision and order another delegate to reconsider the question of his admissibility to Canada.

[5] In my view, the delay in communicating the delegate's decision to Mr Fabbiano constitutes an abuse of process. The delay prejudiced Mr Fabbiano and compromised the integrity of the administration of justice. Accordingly, I must allow this application for judicial review and stay the admissibility proceedings against Mr Fabbiano. It is unnecessary to address the other issues Mr Fabbiano raised.

II. The Delegate's Decision

[6] The Minister's delegate relied entirely on the reasoning presented in the reports of the CBSA officer and the senior analyst.

[7] In her August 2008 report, the officer reviewed Mr Fabbiano's personal history, his family circumstances, his letters of reference, and the criminal activities of the Hells Angels. Most importantly, the officer relied on the evidence of four law enforcement agents who stated that Mr Fabbiano was a member of the Hells Angels. Based on that evidence, she recommended that Mr Fabbiano be referred for an admissibility hearing because he was a member of a criminal organization. On January 19, 2009, the senior analyst agreed, citing much of the same information, and requested that the matter be forwarded to a delegate of the Minister for a final decision. The next day, the delegate decided to refer Mr Fabbiano's file for an admissibility hearing. As mentioned, Mr Fabbiano received the decision in 2013.

III. Has there been an abuse of process?

A. *What is an abuse of process?*

[8] Abuse of process is a common law principle permitting courts to stop proceedings that have become unfair or oppressive. This includes situations where there has been an unacceptable delay resulting in significant prejudice (*Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, at para 101). A key question is whether the delay "impairs a party's ability to answer the complaint" (at para 102). Alternatively, a court can provide a remedy where the proceedings have become oppressive for other reasons including, for example, where the person carried on with his life reasonably believing that no further action would be taken against him (*Ratzclaff v British Columbia (Medical Services Commission)* (1996), BCJ No 36 (BCCA) (QL), at para 23).

[9] A stay of proceedings for an abuse of process is an extraordinary remedy reserved for the clearest cases of prejudice. To grant that remedy, "the court must be satisfied that, 'the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted'" (*Blencoe* at para 120, citing Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 1998) at 9-68).

[10] Whether delay justifies a stay of proceedings depends on all of the circumstances, including the purpose and nature of the case, its complexity, the facts and issues involved, and whether the affected person contributed to or waived the delay (*Blencoe*, at para 122). The test is whether the delay caused "actual prejudice of such magnitude that the public's sense of decency and fairness is affected" (at para 133). There are three steps in considering whether a stay should be imposed:

1. There must be prejudice to the person's right to a fair trial or the integrity of the justice system.

2. There must be no adequate alternative remedy.

3. If there is uncertainty after steps 1 and 2, the court must balance the interests favouring a stay (*eg*, denouncing misconduct or preserving the integrity of the justice system) against the public interest in having a decision on the merits (*R v Babos*, 2014 SCC 16, at para 32).

B. *The basis for Mr Fabbiano's claim of an abuse of process*

[11] Here, Mr Fabbiano's claim of an abuse of process stems from his contention that he should have been given a chance to update his submissions prior to the Minister's delegate's decision, and that the delay in communicating the decision to him (from 2009 to 2013) caused him significant harm. In fact, between 2006 and 2013, he heard nothing about the possibility that he might be inadmissible to Canada.

[12] In response, the respondents say that there was no duty to give Mr Fabbiano another chance to make submissions. Further, they maintain that there were good reasons for the delay and that Mr Fabbiano has not been prejudiced. The importance of protecting Canadians from members of criminal organizations, they say, outweighs any inconvenience to Mr Fabbiano. Mr Fabbiano can present any evidence he wishes to rely on at the admissibility hearing, so any past inability to make submissions can be cured there.

C. *The relevant factors*

(1) The purpose and nature of the case, and its complexity

[13] The purpose of the proceedings involving Mr Fabbiano was to take steps towards his removal from Canada based on his alleged membership in a criminal organization. For a person such as Mr Fabbiano, who has lived in Canada for more than 50 years and has raised a family here, these proceedings obviously involve potentially drastic consequences for him and his relatives. Similarly, from the perspective of the public interest, membership in a criminal organization, while not in itself a crime, is clearly a serious matter, evidenced by the grave immigration consequences that can ensue. Both of these purposes suggest that a high degree of care should be taken in arriving at a decision affecting a person in Mr Fabbiano's circumstances.

[14] At the same time, however, in this case, the proceedings themselves are not particularly complicated. The evidence supporting the allegation that Mr Fabbiano was a member of the Hells Angels had to be balanced with the factors in Mr Fabbiano's favour, including humanitarian and compassionate (H&C) considerations. Both the CBSA officer and the senior analyst reviewed this evidence in the space of a few pages.

(2) The facts and issues at stake

[15] The role of the Minister's delegate is to consider the evidence relevant to admissibility, and to exercise his or her discretion in the circumstances, which may include H&C factors (*Faci v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 693, at para 31).

The latter are more significant in cases involving persons, like Mr Fabbiano, who are long-term permanent residents of Canada. According to departmental guidelines, a delegate should consider the person's age, the duration of his or her residence in Canada, family circumstances, conditions in the person's country of origin, the degree of the person's establishment in Canada, the person's criminal history, and his or her attitude (see Citizenship and Immigration Canada, "ENF 6 - Review of reports under A44(1)" at 19.2).

[16] As mentioned, there was evidence before the delegate showing that Mr Fabbiano was associated with the Hells Angels. In particular, according to some members of the RCMP, Mr Fabbiano had been a member of the Hells Angels since 1992 and had been seen on numerous occasions wearing Hells Angels "colours". In fact, Mr Fabbiano acknowledged to the RCMP that he was a member. However, there was no evidence that Mr Fabbiano actually furthered any criminal activities of the Hells Angels.

[17] There was also evidence about Mr Fabbiano's personal circumstances. In his 2007 submissions, he presented a number of H&C grounds in his favour:

- He has lived almost his entire life in Canada, having visited Italy only once when he was 13 years old. He has little or no family in Italy.
- He does not speak Italian, and would have trouble finding employment in Italy.
- He has four Canadian-born children, two of whom live with him and his common-law spouse.
- He has been steadily employed as a carpenter since 1975, and also runs a small glass business.

- He has only one criminal conviction for which he served a one-year sentence while living at home.
- He has work-related hearing loss and injuries to his hands.
- His spouse and one son are both status First Nations members, who would lose their connection with their heritage if they moved with him to Italy.
- His daughters both have serious medical challenges, including depression, which would be aggravated by their father's deportation.
- His removal from Canada would have a seriously adverse impact on his remaining family members, including his elderly parents who would not be able to visit him in Italy.

[18] Some of this evidence was cited in the reports of the officer and senior analyst, but there is no indication there that H&C factors were actually taken into consideration. The sole relevant issue appeared to be whether Mr Fabbiano was a member of the Hells Angels.

(3) Whether the affected person contributed to or waived the delay

[19] There is no suggestion here that Mr Fabbiano either contributed to the delay or waived it.

[20] The respondents give two reasons for the delay. First, they were trying to find a witness from the RCMP to testify at Mr Fabbiano's hearing. This person was identified in the summer of 2009. Second, officials were preoccupied with the arrival on Canada's west coast of the MV Ocean Lady and the MV Sun Sea in October 2009 and the summer of 2010 respectively. None of this delay, of course, could be attributed to Mr Fabbiano.

[21] The respondents also point out that Mr Fabbiano did not make inquiries about his situation or volunteer any additional information after 2007.

[22] It is clear, however, that the processing of Mr Fabbiano's file was completed in January 2009, before the arrival of the MV Ocean Lady and the MV Sun Sea. There is no explanation for why Mr Fabbiano was not informed of the decision on his admissibility until 2013.

D. *Was Mr. Fabbiano prejudiced by the delay?*

[23] The prejudice caused by the delay in dealing with the issue of Mr Fabbiano's admissibility to Canada takes two main forms.

(1) Loss of opportunity to make further submissions

[24] Since Mr Fabbiano heard nothing until 2013 about his potential inadmissibility after having made submissions in 2007, he reasonably believed that officials were no longer pursuing the issue, and was obviously surprised when he received the 2013 decision. There was nothing that would have suggested to him that he ought to file supplementary submissions. This was not an application on his part, in respect of which he might have had an obligation to inform the decision-maker of any additional information. He was being pursued by the respondents.

[25] In the circumstances, Mr Fabbiano could reasonably have concluded that his submissions had been persuasive and that he was no longer at risk of removal. Further, at the time the decision was communicated to him, the information underlying it was nearly 7 years old.

Undoubtedly, the circumstances of his children and other family members would have evolved during that time period, as would his own situation, including his employment, health and, perhaps, his relationship, if any, with the Hells Angels. In my view, issuing a decision in 2013 relating to his admissibility to Canada based on information gathered in 2007 clearly prejudiced Mr Fabbiano.

(2) Loss of opportunity to present H & C evidence

[26] As mentioned, the role of the delegate is to weigh the evidence and, especially with respect to long-term permanent residents, to take H&C factors into account. Mr Fabbiano provided considerable evidence that would have been relevant to H&C considerations.

[27] Once the Minister's delegate had referred Mr Fabbiano for an inadmissibility hearing, however, no consideration could be given to H&C factors (s 45(*d*) IRPA). Further, Mr Fabbiano would not have a right to appeal from a finding of inadmissibility and, therefore, could not present any H&C evidence at an appeal (s 64 IRPA). Nor would Mr Fabbiano be eligible for an independent assessment of H&C factors (ss 25, 25.1 IRPA).

[28] Therefore, the sole opportunity Mr Fabbiano had to make representations relating to H&C considerations occurred in 2007. Even then, as mentioned above, there is no indication that the CBSA officer, the Senior analyst, or the Minister's delegate gave any serious attention to Mr Fabbiano's personal circumstances.

[29] Accordingly, the delay in dealing with Mr Fabbiano's admissibility resulted in his inability to present evidence to counter his removal from Canada. If his case goes to an admissibility hearing, the issuance of a removal order will be inevitable, and he will have no further remedies available to him (see *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FCJ No 533, at para 47). Clearly, the delay has prejudiced him.

E. *Has there been an abuse of process?*

[30] In my view, the circumstances described above amount to an abuse of process based both on unfairness and a breach of the integrity of our system of justice. The harm to the public interest in allowing the proceedings to continue would be greater than the harm caused by halting them now.

IV. Should a stay be imposed?

[31] In my view, Mr Fabbiano's entitlement to a fair hearing has been infringed by delay. He has lost the opportunity to present relevant evidence.

[32] In turn, the integrity of our justice system has been compromised as a result. As things stand, a long-term permanent resident, with a minor criminal conviction 15 years ago, will be removed from Canada, and separated from his family, without proper consideration of the pertinent evidence. The delay shows that officials were not concerned that Mr Fabbiano's presence in Canada posed a risk to Canadians.

[33] Further, there is no adequate alternative remedy in the circumstances. The delay has not only created unfairness and infringed on the integrity of our justice system, it has occasioned serious personal and psychological harm to Mr Fabbiano and his family. The only possible alternative remedy would be to remit the matter back to the delegate to carry out a proper analysis of the evidence. However, that recourse would only add significant further delay, psychological stress, and costs.

[34] Therefore, in my view, the interests favouring a stay of proceedings far outweigh the public interest in proceeding to an admissibility hearing where the outcome is a foregone conclusion, without there having been any serious consideration of the personal circumstances of a long-term permanent resident of Canada and his family.

V. Conclusion and Disposition

[35] The delay in dealing with the question of Mr Fabbiano's possible inadmissibility to Canada was oppressive and occasioned an abuse of process. I must, therefore, allow this application and order that the inadmissibility proceedings relating to Mr Fabbiano be permanently stayed. Any submissions relating to a question of general importance should be filed within 10 days of this judgment.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The inadmissibility proceedings relating to Mr Fabbiano are permanently stayed.

3. The Court will consider any submissions regarding a certified question that are filed within ten (10) days of the issuance of these reasons.

"James W. O'Reilly"
Judge

Annex

Faster Removal of Foreign Criminals Act, SC 2013, c 16	*Loi accélérant le renvoi de criminels étrangers*, LC 2013, c 16
9. Subsection 25(1) of the Act is replaced by the following:	**9**. Le paragraphe 25(1) de la même loi est remplacé par ce qui suit :
Humanitarian and compassionate considerations — request of foreign national	Séjour pour motif d'ordre humanitaire à la demande de l'étranger
25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 —, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 — ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 —, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
10. Subsection 25.1(1) of the Act is replaced by the following:	**10.** Le paragraphe 25.1(1) de la même loi est remplacé par ce qui suit :
Humanitarian and compassionate considerations — Minister's own initiative	Séjour pour motif d'ordre humanitaire à l'initiative du ministre

25.1 (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

25.1 (1) Le ministre peut, de sa propre initiative, étudier le cas de l'étranger qui est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 — ou qui ne se conforme pas à la présente loi; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

Immigration and Refugee Protection Act, SC 2001, c 27

Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27

Organized criminality

Activités de criminalité organisée

37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for:

37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants:

(*a*) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

(*b*) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.

b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

Application

(2) Paragraph (1)(*a*) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.

Application

(2) Les faits visés à l'alinéa (1)*a*) n'emportent pas interdiction de territoire pour la seule raison que le résident permanent ou l'étranger est entré au Canada en ayant recours à une personne qui se livre aux activités qui y sont visées.

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 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

Suivi

(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 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.

Minister may make a removal order.

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

…

(*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.

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

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

[…]

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.

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.

FEDERAL COURT

SOLICITORS OF RECORD

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