Federal Court  Cour fédérale

Date: 20170202

Docket: IMM-1967-16

Citation: 2017 FC 131

Ottawa, Ontario, February 2, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

HARRYNARINE SAHADEO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Tyrone Barrow was arrested and detained by the Canada Border Services Agency on September 29, 2015 in order to compel his appearance at an admissibility hearing under subsection 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*]. On December 11, 2015, a member of the Immigration Division of the Immigration and Refugee Board ordered Mr. Barrow's release from detention subject to several conditions, one of which

was that the Applicant, Harrynarine Sahadeo, post a cash bond in the amount of $3,000 and a performance bond in the sum of $15,000; and another which required Mr. Barrow to:

> Report to an officer at the CBSA Office at 6080 McLeod Rd., Niagara Falls, ON L2G 7T2 on Tuesday December 15, 2015 & Thursday December 17, 2015 and every Tuesday and Thursday thereafter between the hours of 8-12pm & 1-4pm. A CBSA officer may, in writing, reduce the frequency or change the reporting location.

[2] Although Mr. Barrow reported as required to the CBSA on December 15th, he failed to do so on December 17th. Ultimately, this failure resulted in an inland enforcement manager [the Manager] determining in a letter to the Applicant dated April 20, 2016, that there were grounds to estreat the $15,000 performance bond and forfeit the $3,000 cash bond. The Applicant has now applied under subsection 72(1) of the *IRPA* for judicial review of the Manager's decision.

I. Background

[3] Following Mr. Barrow's failure to report on December 17, 2015, CBSA issued a warrant for his arrest, and Mr. Barrow was arrested after he voluntarily presented himself at the CBSA office during the morning of December 18th. Initially, Mr. Barrow informed CBSA that he was unable to report on December 17th because he had a court appearance that day. After investigation, however, CBSA determined that while Mr. Barrow had attended at the court in the morning of December 17th, he departed from the court at approximately 11:00 a.m. to travel to Niagara Falls to shop with his girlfriend for groceries and Christmas gifts. After shopping, Mr. Barrow went to his girlfriend's residence and took a nap, awakening at around 5:00 p.m. and realizing then that he had forgotten to report to the CBSA office. Mr. Barrow contacted his

lawyer, but the record is unclear as to whether the lawyer contacted the CBSA Office later that evening.

[4] In a report dated January 5, 2016, an inland enforcement officer [the Officer] recommended to an inland enforcement manager that the bonds provided by the Applicant be forfeited and enforced. After reviewing the facts surrounding Mr. Barrow's failure to report to the CBSA Office on December 17, 2015, the Officer stated:

> I have noted that a requirement to attend a proceeding in a criminal court would constitute a lawful and reasonable excuse to fail to report, however, I have also noted that this obligation only required Mr. BARROW's physical presence for a small part of the morning of his reporting date, leaving Mr. BARROW with the better half of the day to report. I noted that Mr. BARROW accounted for his activities in the late morning and afternoon of December 17, 2015, and I am satisfied that none of these activities constitute lawful or reasonable excuses for failing to report as required by the *Immigration and Refugee Protection Act*.
>
> …
>
> Notwithstanding Mr. BARROW's flippant attitude towards the requirements of the *Immigration and Refugee Protection Act* and the laws of Canada, I am not satisfied that Mr. SAHADEO has adequately fulfilled his responsibilities as a bondsperson under the *Immigration and Refugee Protection Act*.

[5] On February 25, 2016, the Manager reviewed and concurred with the Officer's recommendation to estreat and forfeit the bonds, noting as follows:

> Mr. BARROW failed to provide a lawful or reasonable excuse for failing to report as required on 17 December 2015. As stated by Mr. BARROW, his court matters were concluded on the morning of the 17 December 2015. Mr. BARROW chose not to report as required; he chose to shop within a reasonable distance from the CBSA Niagara office where the opportunity existed to attend. At no point on this day did Mr. BARROW or any person acting on his behalf attempt to contact the office for his absence both during

> business hours or by voicemail after-hours on the phone number provided on the conditions.
>
> I recognize the fact that Mr. BARROW did voluntarily report to the office the following morning on 18 December 2015 but this act does not provide a reason for his violation or excuse it in any way.

[6] The Manager then sent a letter to the Applicant dated February 25, 2016, indicating that Mr. Barrow had breached the conditions of his release and that if the Applicant had any reasons why the bonds should not be forfeited and realized he could provide written submissions by March 17, 2015. The Manager also indicated that he would consider the Applicant's submissions when determining what action would be taken. After receiving no submissions from the Applicant, the Manager sent a second letter to the Applicant dated April 13, 2016, stating that the cash bond would be forfeited and the performance bond would be enforced. Upon receipt of this letter, the Applicant personally attended at the CBSA office and informed CBSA that he had not received any prior correspondence from CBSA. Accordingly, CBSA afforded him an extension of time to present submissions, which he did so through his legal counsel in a letter dated April 18, 2016.

[7] The Applicant's counsel referred the Manager to Citizenship and Immigration Canada's operational bulletin, "ENF 8: Deposits and Guarantees" [the Manual]. Section 7.8 of the Manual states that "CBSA managers and officers have discretionary power to decide whether a breach of conditions is severe enough to warrant the forfeiture of the deposit or the guarantee." Based on this section, the Applicant's lawyer submitted that Mr. Barrow's breach was not "severe enough" to warrant the forfeiture and enforcement of the bonds, noting that Mr. Barrow had not absconded or gone "underground" and that there was no breach less severe than failing to report

for one day and immediately showing up the following morning to report. The Applicant's lawyer further submitted that Mr. Barrow's failure to report was outside the Applicant's control and that, although he had set up a plan for Mr. Barrow to report, he was unable to follow up with Mr. Barrow on December 17, 2015 because he was out of town on business and his phone was stolen.

[8] The Manager reviewed and considered the Applicant's submissions on April 20, 2016, yet he again determined that there were grounds to forfeit the cash bond and estreat the performance bond. In the reasons for his decision, the Manager noted:

> With Mr. BARROW's previous statements, he failed to provide a lawful or reasonable excuse for failing to report… His court matters … concluded on the morning of the 17 December 2015 and Mr. BARROW chose not to report as required afterwards, rather he chose to shop within a close proximity to the CBSA Niagara office and take an afternoon nap.
>
> …
>
> I realize that Mr. BARROW did voluntarily report to the office the following morning on 18 December 2015 but this act does not excuse his violation.
>
> Mr. SAHADEO chose to act as a bondsperson on behalf of Mr. BARROW and in doing so is responsible for his actions.
>
> I do understand that the bond is of a significant value, but I do not believe the reasons provided warrant a complete refund of Mr. SAHADEO's cash bond or cancellation of the performance bond.
>
> I maintain the opinion that the bonds be forfeited as previously decided prior to submissions.

[9] The Manager then sent the Applicant a letter dated April 20, 2016, thanking him for his submissions, yet determining again that the cash bond would be forfeited and the performance bond would be enforced.

II. Issues

[10] The parties raise the following issues:

1. What is the appropriate standard of review?
2. Whether the Court can review the reports of the Officer and the Manager written before the Applicant submitted written representations?
3. Was the Manager's decision reasonable?

III. Analysis

A. *Standard of Review*

[11] The applicable standard of review in assessing the Manager's decision was stated in *Etienne v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 1128, 469 FTR 40 [*Etienne*] as follows:

> [11] First of all, a judicial review of the exercise of the CBSA's discretion is a question of mixed fact and law and therefore subject to review on a standard of reasonableness (*Domitlia v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 419 at para 27 [*Domitlia*]; *Kang v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 652 at para 13 [*Kang*]; *Hussain v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 234 [*Hussain*]; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 41).

> [12] Second, the CBSA's decision demands deference, and this Court should not interfere if "statutory discretion has been exercised in good faith, in accordance with the principles of natural justice . . ." (*Uanseru v Canada (Solicitor General)*, 2005 FC 428 at para 25 [*Uanseru*], cited in *Khalife v Canada (Minister of Citizenship and Immigration)*, 2006 FC 221 [*Khalife*]).
>
> [13] Furthermore, the Court must also consider whether the CBSA's decision complies with the principles of natural justice and procedural fairness, having regard to all the circumstances (*Pusat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 428 at para 14; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Chir v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 765 at para 16; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paras 52 and 53 [*Sketchley*]).
>
> [14] This Court does not owe the CBSA's decision any deference in respect of the duty of procedural fairness. This principle was laid down by Justice Richard G. Mosley in *Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 (see also *Rivas v Canada (Minister of Citizenship and Immigration)*, 2007 FC 317:
>
> > [44] However, as noted by Justice Blanchard in *Thamotharem* at paragraph 15, a pragmatic and functional analysis is not required when the Court is assessing allegations of the denial of natural justice or procedural fairness: *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29. Instead, the Court must examine the specific circumstances of the case and determine whether the tribunal in question observed the duty of fairness. If the Court concludes that there has been a breach of natural justice or procedural fairness, no deference is due and the Court will set aside the decision of the Board.

[12] In more recent decisions, this Court has confirmed that a decision as to whether a bond should be forfeited is "highly discretionary" (*Hamid v Canada (Public Safety and Emergency*

Preparedness), 2015 FC 1208 at para 12, [2015] FCJ No 1242; *Khalil v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 641 at para 15, 481 FTR 132.)

[13] The Manager's decision in this case, therefore, is to be reviewed on a deferential standard of reasonableness. The Court is tasked with determining whether the decision-maker's decision is justifiable, transparent, and intelligible, and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708 [*Newfoundland Nurses*]. Additionally, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; and it is also not "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339.

[14] As to the issue raised by the Applicant concerning whether the Court can review the Officer's and Manager's reports, which were written prior to the Applicant's written submissions, this raises an allegation of procedural unfairness. The question of whether the duty of procedural fairness was breached is subject to the correctness standard of review (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502). As noted in *Etienne*, the Court "does not owe the CBSA's decision any deference in respect of the duty of procedural fairness"

(at para 14). Under the correctness standard of review, the Court must determine whether the process followed by the Manager achieved the level of fairness required by the circumstances of the matter (see: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3). It is, therefore, not so much a question of whether the Manager's decision is correct as it is a question of whether the process followed by him in making the decision was fair (see: *Hashi v Canada (Citizenship and Immigration)*, 2014 FC 154 at para 14, 238 ACWS (3d) 199; and *Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para 35, 471 FTR 71).

B. *Whether the Court can review the reports of the Officer and the Manager written before the Applicant submitted written representations?*

[15] The Applicant contends that this Court should not consider or review the Officer's report and recommendation dated January 5, 2016 or the Manager's initial decision dated February 25, 2016 because they were generated prior to giving the Applicant an opportunity to make submissions and, consequently, were rendered in breach of the duty of procedural fairness. The Applicant argues that the report and initial decision should not be considered in assessing the reasonableness of the Manager's ultimate decision. In this regard, the Applicant points to section 7.8 of the Manual:

> **Deposit or guarantee given by a third party**
>
> The rules of procedural fairness require that a CIC or CBSA officer not recommend forfeiture of a deposit or realize a guarantee executed by a third party until that person is given an opportunity to make a written representation concerning the decision to be made.
>
> CIC and CBSA managers and officers have discretionary power to decide whether a breach of conditions is severe enough to warrant the forfeiture of the deposit or the guarantee. However, CIC as

> well as CBSA managers and officers do not have discretionary power to reduce or otherwise alter the amount of the deposit or guarantee.
>
> When a breach of conditions occurs that will result in forfeiture of a deposit or action to realize on a guarantee, the depositor or guarantor must be informed in writing of the breach and the possible forfeiture or enforcement action, and be granted an opportunity for written representation. If the final decision is to forfeit the deposit or guarantee, the depositor or guarantor will be held accountable for the entire amount of the deposit or guarantee.

[16] According to the Applicant, procedural fairness requires that an officer provide a bondsperson with an opportunity to make written representations before recommending forfeiture or the realization of a guarantee. The Applicant says the Officer's decision to make the recommendation and the Manager's subsequent review and acceptance of such recommendation were procedurally unfair, notwithstanding the fact that the Manager subsequently provided the Applicant with an opportunity to make written submissions. The upshot of the Applicant's argument is that the duty of procedural fairness in this context required an opportunity to make written submissions on two separate occasions: first, before the Officer initially recommended forfeiture and, again, when the Manager decided to accept the recommendation.

[17] It is true, as the Applicant notes, that the Manual states that the rules of procedural fairness require an officer to "not recommend forfeiture of a deposit or realize a guarantee executed by a third party until that person is given an opportunity to make a written representation concerning the decision to be made." Section 7.8 of the Manual also states that: "the depositor or guarantor must be informed in writing of the breach and the possible forfeiture or enforcement action, and be granted an opportunity for written representation." However, according to section 7.5 of the Manual, it is a manager, and not an officer, who has responsibility

to “notify the person in writing of the reason that action is being taken to forfeit the deposit or enforce the guarantee.” The content of the duty of procedural fairness is not, in my view, as high as the Applicant submits because nothing would be gained by an additional opportunity to provide written submissions to an officer who merely makes a report and recommendation to a manager who is then tasked with deciding whether to forfeit or realize upon the bonds.

[18] In this case, the Officer recommended forfeiture of the bonds based on his analysis of Mr. Barrow’s breach of his conditions of release. The Officer merely made a recommendation, not a final decision. The Manager then reviewed the Officer’s report and agreed with the recommendation. As a result, the Manager sent the Applicant a letter, dated February 25, 2016, inviting the Applicant to make submissions as to the reasons why the bonds should not be forfeited and advising the Applicant that he would consider such reasons when determining what action would be taken. At this point in time, no final decision had been made. Arguably, the Manager’s second letter to the Applicant dated April 13, 2016, stating that the cash bond would be forfeited and the performance bond enforced, constituted a final decision. However, as matters turned out, the Manager revisited this decision after the Applicant had provided written submissions, resulting in the Manager’s final decision contained in his letter of April 20, 2016.

[19] The duty of procedural fairness in this case required that the Applicant know the case he had to meet and to have an opportunity to meaningfully participate. The Applicant was informed of the Manager’s intention to forfeit and estreat the bonds and was provided an opportunity, albeit late, to participate in the Manager’s ultimate decision embodied in his letter of April 20, 2016. The Applicant’s allegation of procedural unfairness is without merit because the Applicant

knew the case to be met and participated fully in the process. The fact that the Officer's recommendation and the Manager's initial decision were drafted before receipt and review of the Applicant's submissions did not make the process unfair. On the same day the Manager accepted the Officer's recommendation, he sent a letter to the Applicant outlining his position and requesting written submissions as to why the bonds should not be forfeited. The Officer's recommendation and the Manager's letter of February 13, 2016, were required steps in order to determine whether any further action would be necessary or appropriate after consideration of the Applicant's submissions.

[20] Although the Applicant is correct that only the Manager's decision dated April 20, 2016, is under judicial review, the Officer's report leading up to this decision and the Manager's initial decision dated February 25, 2016, can and should be considered since they inform the Manager's ultimate decision. The Officer's report and recommendation were a necessary step in the process and served to inform the Manager's decision. Additionally, the Manager's ultimate decision was informed by arguments presented by the Applicant's counsel.

C. *Was the Manager's decision reasonable?*

[21] The Applicant's main argument is that the Manager failed to assess whether the breach of the conditions was "severe enough" to warrant a forfeiture of $18,000. According to the Applicant, the Manager narrowly focused on the existence of Mr. Barrow's breach and on whether his appearance to the CBSA office the following morning minimized the severity of his breach. The Applicant maintains that the Manager did not assess the severity of the breach, and

also points out that Mr. Barrow did not abscond, go underground, or cause the CBSA to expend resources to search for him.

[22] The Respondent says the Manager turned his mind to all of the relevant arguments and facts in rendering his decision. For example, the Manager considered whether the breach was severe enough to warrant forfeiture because it was raised in the submissions by the Applicant's counsel. Likewise, the Manager also turned his mind to the Applicant's position that Mr. Barrow's criminal lawyer called the CBSA and left a message. The Respondent notes that the Manager considered the fact Mr. Barrow's breach was beyond the Applicant's control, and also that Mr. Barrow reported immediately after. The Respondent says that while the Applicant may disagree with the Manager's conclusion, this does not place the decision outside the range of possible and acceptable outcomes. The fact Mr. Barrow did not abscond or cause the CBSA to expend resources to locate him does not impugn the reasonableness of the decision. According to the Respondent, the Manager reasonably concluded that Mr. Barrow failed to provide a lawful or reasonable excuse for failing to report.

[23] The case law suggests that while a CBSA manager or officer is required to assess whether the severity of a breach of conditions warrants forfeiture if raised as an issue, they nevertheless have significant discretion in making such an assessment. For example, in *Hussain v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 234 at para 12, [2008] 4 FCR 417, the Court stated that this discretionary power "must be considered on a case-by-case basis" and that "consideration must be given as to whether the breach was 'severe enough'." In *Etienne*, the Court observed that: "CBSA exercises its discretion to demand the

repayment of the guarantee, if it decides that the breach of conditions is ‘severe enough’ to justify this” (at para 22).

[24] The Manager’s decision in this case cannot be faulted simply because he did not fully or extensively engage with the issue of whether the breach of condition was severe enough to warrant forfeiture. The Manager discussed the circumstances surrounding the breach of conditions and he clearly considered the Applicant’s submissions in this regard as stated in his notes. The Manager found that Mr. Barrow failed to provide a lawful or reasonable excuse for failing to report and “chose not to report” despite having ample opportunity to do so and, instead, went shopping and took a nap. While these reasons may be somewhat lacking, they are nevertheless reasons. This is not a case where the reasons for the decision, though brief, are so unintelligible, unjustified or opaque that the decision is unreasonable. *Newfoundland Nurses* dictates that the Court must show deference to a decision-maker’s reasons and the insufficiency or inadequacy of reasons is not a stand-alone basis for granting judicial review. Moreover, a deferential standard of review requires the Court not to interfere with the Manager’s discretion and decision to forfeit the bonds where, as in this case, it “has been exercised in good faith, in accordance with the principles of natural justice” (*Etienne* at para 12). The Manager’s decision is justifiable and constitutes an outcome which is defensible in respect of the facts and law.

IV. Conclusion

[25] The Applicant’s application for judicial review is dismissed.

[26] Neither party proposed a question for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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