Federal Court  Cour fédérale

Date: 20161222

Docket: IMM-385-16

Citation: 2016 FC 1407

Fredericton, New Brunswick, December 22, 2016

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

ALLAN STEADMAN CHAMBERS

Applicant

and

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

Respondents

JUDGMENT AND REASONS

I. Overview

[1] In this single application for judicial review, Allan Steadman Chambers [Mr. Chambers] challenges three decisions, which ultimately led to a finding of his inadmissibility under paragraph 36(1)*(a)* of the *Immigration and Refugee Protection Act*, SC 2011, c 27 [IRPA]. The three challenged decisions are: (i) the immigration Officer's decision to prepare a report pursuant

to subsection 44(1) of the IRPA to the Minister of Public Safety and Emergency Preparedness' delegate; (ii) the decision of the Minister's delegate pursuant subsection 44(2) of the IRPA to refer Mr. Chambers to an admissibility hearing before the Immigration Division of the Immigration and Refugee Board [the ID]; and (iii) the decision of the ID to order Mr. Chambers' removal from Canada.

[2] The Respondents by way of preliminary motion contend the Applicant cannot lawfully challenge the three impugned decisions via one application for judicial review. The Respondents acknowledge that challenges to all three decisions of this nature (subsections 44(1), 44(2) and a removal order by the ID) are often heard at the same time as was the case in *Hernandez v Minister of Citizenship and Immigration*, 2005 FC 429, [2006] 1 FCR 3 [*Hernandez*]. However, they note that in *Hernandez* the Court considered three separate applications for judicial review with three separate file numbers which were heard at the same time. The Respondents contend that the July 22, 2016 Order granting leave to commence judicial review proceedings in the present case is unclear as to whether leave is granted to challenge all three decisions or just the ID removal order. The Applicant counters that this same issue was raised in *Clare v Minister of Citizenship and Immigration*, 2016 FC 545, [2016] FCJ no 513 [*Clare*]. In *Clare*, O'Reilly, J. disagreed with the Minister's contention. He concluded that, "[w]hile it was open to Mr. Clare to seek judicial review of those other decisions, it was not necessary to do so in order to challenge the ID's decision on admissibility". While O'Reilly, J. acknowledged that in some cases applicants had challenged multiple decisions through separate applications, he did not interpret them as "requiring applicants to do so in order to challenge the ID's decision on admissibility".

[3] Mr. Chambers contends this issue has already been disposed of by the judge who granted leave. I agree. Leave was granted on the application as filed, without any limitation. The question is therefore moot. However, by way of *obiter*, I would state that I agree with the approach adopted by O'Reilly, J. in *Clare*. Only one application for judicial review of the three section 44 decisions is necessary, because an applicant will not know of the need to challenge the decisions until a removal order has been made by the ID. Also, one application results in significant savings in time, litigation costs and judicial resources.

[4] As a result of that set out in paragraphs 2 and 3, I would dismiss the Respondents' preliminary motion. However, for the reasons which follow, I would dismiss the application for judicial review.

II. Legislative Scheme

[5] Subsection 36(1) of the IRPA sets out the test for inadmissibility based upon grounds of serious criminality:

> 36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for
>
> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed.

[6] Subsection 44(1) of the IRPA provides a very broad discretion to an officer who is of the opinion that a permanent resident is admissible. That section reads as follows:

> 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.

[7] The subsection 44(1) report [section 44 report] is then transmitted to the Minister, whose delegate may then decide to refer the matter to the ID for consideration of a removal order (subsection 44(2)). I note here that, pursuant to section 64, no appeal to the Immigration Appeal Division is allowed.

III. Facts

[8] Mr. Chambers is a citizen of Jamaica. He arrived in Canada on April 4, 2007 and is now a permanent resident. He is currently in a relationship with a woman who is the mother of their one-year-old son. He also has a twenty-one year-old son living in Toronto.

[9] Since his arrival in Canada, Mr. Chambers has been convicted of at least six violations of the *Criminal Code*, RSC 1985, c C-46 [the Code], two of which engaged subsection 44(1) of the IRPA. The other crimes for which he was convicted were failure to comply with a probation order (2 counts), failure to comply with a court order regarding judicial interim release, theft under $5000.00 and possession of property obtained by crime under $5000.00. The two crimes which engaged subsection 44(1), the first of which was not the subject of a report, were uttering a forged document contrary to section 368.1 of the Code in 2009 and robbery with violence contrary to section 344 of the Code on July 8, 2015. It is this latter conviction which triggered the section 44 process.

[10] Shortly after July 8, 2015, the Officer visited Mr. Chambers where he was being held. During this meeting, the Officer instructed him to fill out the forms provided and left her business card. She said she would be back to retrieve the completed documents at a later time. The Officer returned in late August 2015 to retrieve the forms, and, during a brief interaction, provided Mr. Chambers more information regarding his rights and the section 44 process.

[11] In November 2015, Mr. Chambers' girlfriend received a disclosure package from the Canadian Border Services Agency [CBSA] regarding his admissibility hearing before the ID. Mr. Chambers contends that it is only following receipt of those documents and retaining a lawyer that he learned he may face deportation. However, this evidence is contradicted by the fact that he received a warning letter from the CBSA in 2010 following his first reportable conviction and by his responses to the questions in the forms provided to him during the section 44(1) process. In those forms, Mr. Chambers indicated who would be affected should he be removed from Canada, how he would be affected if removed from Canada and wrote the following narrative: "If I get a chance to stay in Canada I would be crime free. Anything the government wants me to do to stay, I do it. I swear on my life." In addition, upon agreeing to a plea bargain with respect to the robbery, Mr. Chambers said that his lawyer told him he "may get sent back to Jamaica".

IV. Impugned Decisions

[12] In her section 44 report, the Officer reported that Mr. Chambers was inadmissible pursuant to paragraph 36(1) of the IRPA. In her narrative, she made reference to a warning letter Mr. Chambers received from the CBSA in 2010 about his first reportable conviction. She noted

that she believed Mr. Chambers' desire to attend a relapse prevention program to be disingenuous; his only motivation being the risk of being deported. Further, she stated that his failure to explain the circumstances of his July 2015 conviction was "concerning". The Officer found that Mr. Chambers showed a low prognosis for rehabilitation and a high risk to reoffend. The Officer took into consideration Mr. Chamber's family circumstances, including his girlfriend, his one-year-old son in Canada and his 20-year-old son in Canada. She recommended a referral to an admissibility hearing. On September 17, 2015, the Minister's delegate referred Mr. Chambers to the ID for the hearing. Following the admissibility hearing, the ID found that Mr. Chambers met all the criteria to be found inadmissible under subsection 36(1) of the IRPA and made a removal order against him.

V. Issues

[13] Mr. Chambers raises the following issues:

1. Did the Officer observe the principles of procedural fairness and natural justice?
2. Was the referral decision reasonable in the circumstances?

VI. Standard of Review

[14] It is trite law that when the standard of review applicable to a question is settled, no further analysis regarding the appropriate standard is required. Questions regarding the duty of fairness owed by an immigration officer under section 44 attract the correctness standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No. 9; *Cha v Canada (Minister of*

Citizenship and Immigration), 2006 FCA 126, [2007] 1 FCR 409). That is, in the circumstances, was the duty of fairness met?

[15] The ID's decision and the antecedent steps (subsections 44(1) and 44(2) analysis) taken toward reaching that decision are measured against the standard of reasonableness. They must fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47) subject, of course, to any procedural fairness issues raised.

VII. Analysis

A. *Duty of Procedural Fairness*

[16] Mr. Chambers contends the Officer failed to provide him with appropriate procedural fairness during their initial meeting in July 2015. Instead of meaningfully explaining to him the nature and consequences of a subsection 44(1) report, he contends the Officer simply dropped off the forms, with her business card, and said she would return to retrieve the forms in a week. Mr. Chambers expresses particular concern about the rapidity with which the Officer wrote her report, which, he contends, demonstrated a failure to consider "his evidence and circumstances".

[17] The Respondents contend that procedural fairness with respect to section 44 reports is "relaxed and [consists] of the right to make submissions and to obtain a copy of the report" (*Richter v Minister of Citizenship and Immigration,* 2008 FC 806 at para 18, [2009] 1 FCR 675). Mr. Chambers acknowledged in his affidavit that the Officer left him forms "A44 (1)

Inadmissibility Report - Background and Personal Information Form" [PIF] and "A44 (1) Inadmissibility Report - Supplementary Questionnaire" [Questionnaire]. He acknowledges he had approximately one month within which to complete them. The Respondents' position is that the forms afforded Mr. Chambers the right to make submissions, he in fact made submissions, and he received a copy of the report in order to prepare for the admissibility hearing. The Respondents contend this procedure meets the requirements of procedural fairness expected in the circumstances. I agree.

[18] While I note that the Officer's section 44 report was made on July 13, 2015, only a few days after having first interacted with Mr. Chambers, this report simply indicated that Mr. Chambers was inadmissible for serious criminality, having met all the criteria of subsection 36(1) of the IRPA. These facts alone were sufficient to make the recommendation that Mr. Chambers be referred to an admissibility hearing. In addition, I note that it was only on September 15, 2015, after having retrieved both forms from Mr. Chambers that the Officer wrote her narrative and recommended to the Minister's delegate that he be referred to an admissibility hearing. Based upon this sequence of events, I cannot accept Mr. Chambers' contention that the Officer did not consider his evidence and his circumstances. To summarize, the Officer made the report on July 13 and wrote her narrative on September 15, 2015, following which the Minister's delegate considered the matter on September 17, 2015.

[19] Mr. Chambers further contends that, given the importance accorded to the description of the circumstances surrounding his robbery conviction, the Officer should have asked him for more detail. I disagree. The Questionnaire given to Mr. Chambers provided him the opportunity

to provide details about the robbery. In the context of a section 44 report, it is not an officer's duty to make further inquiries on an issue that the person has already had the opportunity to address. In addition, I note that Mr. Chambers chose not to answer the question regarding the details of the robbery. He chose simply to answer the next question on the Questionnaire by stating that the conviction was "just and fair".

[20] I find the Officer met the duty of procedural fairness required in the circumstances. In addition, there was no unfairness in the manner in which the matter was handled by the Minister's delegate or the ID.

B. *Reasonableness of the Decision*

[21] Mr. Chambers contends the Officer, in her section 44 report, failed to properly emphasize certain factors, over-emphasized other factors, failed to consider the whole of the evidence before her, and failed to properly consider the best interests of the minor child.

[22] The Minister's guidelines on the writing of section 44 reports, "Enforcement Manual - ENF 5: Writing A44(1) Reports", indicates that an officer may consider the person's age at the time they became a permanent resident in Canada, the length of time they have been in Canada, the location of their family support, and their degree of establishment. The officer and the Minister's delegate may also consider humanitarian and compassionate [H&C] factors (*Cha v Canada (Minister of Citizenship and Immigration*), 2006 FCA 126 at para 37, [2007] 1 FCR 409), although this is not mandatory.

[23] In her report, the Officer clearly considered Mr. Chambers' age, his length of time in Canada, education and training, criminal history, family situation, extended family, employment, health issues, and circumstances of the latest reportable crime. With respect to humanitarian and compassionate issues and best interests of the minor child, the Officer stated:

> It is acknowledged that Mr. Chambers does have humanitarian and compassionate grounds to remain in Canada, having a one year old Canadian born child and has submitted 2 letters of support from his girlfriend and his sister-in-law.
>
> [My emphasis.]

[24] Having considered the fact that Mr. Chambers received a warning letter in 2010 and had "ample opportunity to make changes in his life", the Officer found that he should be referred to an admissibility hearing. Although this was not the outcome desired by Mr. Chambers, I find that it was reasonable in the circumstances. It is not the role of the Court on judicial review to re-weigh the evidence (*Khosa v Canada (Minister of Citizenship and Immigration*), 2010 FC 83 at para 37, [2010] FCJ no 99; *Singh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 673 at para 10, [2008] FCJ no 864). Furthermore, I find that the Officer was alert, alive and sensitive to the best interests of the child. Such interests do not always outweigh other considerations (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ no 39 at para 75). Finally, I am satisfied with the reasonableness of the Minister's delegate and the ID's decisions.

[25] For the reasons herein, I would dismiss this application for judicial review.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs. No question of general importance is certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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